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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 308

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION OF OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALY CONNELLY AND FRANK CARLSON FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Oleta O'Connor Yates, Henry Steinberg, Loretta Starvus Stack, Frank Efroim Spector, Albert Jason Lima, Carl Rude Lambert, Rose Chernin Kusnitz, Ernest Otto Fox, Ben Dobbs, Dorothy Healey Connelly and Frank Carlson respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Record p. 802) affirming the judgments of conviction herein of the District Court for the Southern District of California, Central Division.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. A) is not yet reported. The written opinions of the District Court are reported in 102 F. Supp. 87; 104 F. Supp. 405; 106 F. Supp. 737; 106 F. Supp. 892; 106 F. Supp. 906. These opinions are contained in the Appendix herein (App. B).

JURISDICTION.

The judgment of the Court of Appeals is dated March 17, 1955, and was entered on the same day. The time of petitioners to file petition for rehearing was by order of the Court of Appeals extended to May 16, 1955. A petition for rehearing was duly filed on May 13, 1955, and an order made and entered on June 15, 1955 denying the said petition for rehearing. On the 27th day of June,

1955, the time for filing petitions for writ of certiorari herein was extended to and including August 13, 1955 by the order of Mr. Justice Frankfurter. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether the refusal of the trial judge, sustained by the Court of Appeals, to give any instructions to the jury to the effect that the law punishes only advocacy and teaching of the forcible overthrow of the Government by language reasonably and ordinarily calculated to incite persons to action with intent that such teaching and advocacy be of a rule or principle of action resulted in an erroneous construction and application of 18 U.S.C. Sections 371 and 2385 and violation of the provisions of the First Amendment.

2. Whether the courts below erroneously applied 18 U.S.C. Sections 371 and 2385 to these petitioners in violation of the provisions of the First Amendment insofar as the clear and present danger rule is concerned by, separately or in their totality: refusing to submit the question of incitement to the jury for their determination; refusing any judicial evaluation at the trial of the evidence on the question of the nature of petitioners' activities or their power to bring about an attempt to forcibly overthrow the Government; and by equating clear and present danger solely with the intent, of an advocate or teacher of the proscribed doctrine, to forcibly overthrow the Government as speedily as circumstances would permit.

3. Whether the construction of the word "organize" in 18 U.S.C. Section 2385 by the courts below to include "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization," and the application of the statute as construed to these petitioners, was contrary to law and in violation of the provisions of the First Amendment and the due process provisions of the Fifth Amendment.

4. Whether the holdings of the courts below, that proof of the advocacy and teaching of the doctrines of Marxism-Leninism by the Communist Party together with proof as to each of the petitioners of membership and the holding of office in the Party and participation in lawful activities therein were sufficient to sustain a conviction under the instant indictment, established a standard of proof contrary to law, including the provisions of 50 U.S.C. Section 783(f), the provisions of the First Amendment, and the due process provisions of the Fifth Amendment.

5. Whether the holdings of the courts below, that the evidence as to each of the petitioners and the nature of his activities was sufficient to establish the conspiracy alleged in the indictment, his connection with the conspiracy, his specific intent to forcibly overthrow the Government as speedily as circumstances permit and his power to bring about an attempt at such overthrow, and to sustain the conviction, were contrary to law and violated the provisions of the First Amendment and the due process provisions of the Fifth Amendment.

6. Whether the holdings of the courts below which permitted the jury to draw inferences of a criminal intent to further and effect the objects of the conspiracy alleged in the indictment solely from nonculpable speech, press and assembly, or from allegations of overt acts not supported by any evidence, were contrary to law and constituted an erroneous construction of the "overt acts" provisions of 18 U.S.C. Section 371 as applied with 18 U.S.C. Section 2385 to the prosecution of the instant indictment, and were in violation of the provisions of the First Amendment and the due process provisions of the Fifth Amendment.

7. Whether the holding of the Court of Appeals sustaining the rulings of the trial judge in refusing to grant a continuance of the trial at its commencement upon the serialized publication of the "Philbrick Story" and in refusing to grant the motion for mistrial upon the publication of the "F.B.I. Report" at the eve of the submission of the case to the jury deprived petitioners of a fair and impartial trial without due process of law in violation of the provisions of the Fifth and Sixth Amendments.

8. Whether the holding of the Court of Appeals sustaining the refusal of the trial judge to instruct the jury as requested by the petitioners that the testimony of witnesses who entered the Communist Party at the request of the Federal Bureau of Investigation should be weighed with caution deprived petitioners of a fair and impartial trial without due process of law in violation of the provisions of the Fifth and Sixth Amendments.

STATUTES INVOLVED.

The pertinent provisions of the statutes involved: 18 U.S.C. (1946 Ed), Sections 10, 11; 18 U.S.C. (1948 Ed.), Sections 371, 2385; 50 U.S.C., Section 783(f); and the constitutional provisions involved: First, Fifth and Sixth Amendments, are set forth in the Appendix (App. D).

STATEMENT OF THE CASE.

On July 31, 1951, an indictment was returned against eleven of the petitioners here. The indictment charged in a single count a conspiracy formed on or about April 1, 1945, the date of the reconstitution of the Communist Party, to violate certain provisions of the Smith Act. On September 5, 1951, a similar indictment was returned against the remaining three petitioners here (Spector, Carlson and Dobbs). Motions to dismiss the aforesaid indictments were made upon the principal grounds that the indictments failed to allege, (1) the requisite specific intent to forcibly overthrow the Government as speedily as circumstances would permit; and (2) facts establishing a clear and present danger sufficient to justify an application of the Smith Act to these petitioners. The motions to dismiss were granted. 102 F.Supp. 87. The District Court held that both objections made by petitioners could be met in a new indictment merely by an allegation of specific unlawful intent (p. 96):

> "In the case at bar, the 'clear' danger envisioned in the Smith Act is the act of engaging in the proscribed advocacy or teaching with intent to bring about ultimately the overthrow of Government by

means of force or violence. *Dennis v. United States, supra,* 341 U.S. at pp. 499-500, 71 S. Ct. 857.

"The 'present' danger consists in the specific intent of advocate or teacher to accomplish the object of forcible overthrow as speedily as possible. Id. 341 at pp. 508-511, 71 S. Ct. 857."

The view that proof of an accused's advocacy and alleged mental state is sufficient to establish a "clear and present danger" was adhered to by the District Court throughout the trial and on the motions for judgments of acquittal.

A single indictment against the petitioners was returned December 21, 1951 (Clk. R. 2). The new indictment alleged the formation of the consipiracy on or about June 28, 1940 (the date of the enactment of the Smith Act)[1] and charged that petitioners conspired continuously thereafter with each other, with the defendants in *Dennis* (named as co-conspirators, not as defendants in this case), and with persons unknown to the grand jury, to violate Section 2 of the Smith Act, 18 U.S.C. Section 2385, by (1) advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) by organizing, and helping to organize, as the Communist Party of the United States of America, a society of persons to engage in the aforesaid advocacy and teaching, all with the intent of accomplishing the said forceful overthrow as speedily as circumstances would permit. Twenty-three "overt acts"

[1] All other Smith Act indictments directed against members of the Communist Party have alleged the formation of the conspiracy as of 1945, the date of the reconstitution of that Party.

were alleged in the indictment. The "overt acts," alleged to have taken place on various dates between January 31, 1941 and July 24, 1951, consisted of attendance and participation by some of the petitioners at meetings and conventions, and the issuance and circulation of "directives," without allegations as to the content of the meetings or alleged directives. (Clk. R. 2; App. Item 2c, pp. 16-21).[2]

The District Court, prior to trial, denied petitioners' motion to dismiss the new indictment, overruling the plea of the three-year statute of limitations as to the charge of a conspiracy to organize, as the Communist Party of the United States of America, a society of persons who teach and advocate the forcible overthrow of the Government (Clk. R. 10-27). A motion for a bill of particulars which sought, among other things, information as to when the alleged conspiracy commenced and whether the alleged conspiracy to organize as aforesaid was ever consummated was denied *in toto* without opinion (Clk. R. 66-76).

A discussion of the trial proceedings and the evidence follows hereafter in this Statement.[3] Motions by peti-

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[2]Each party filed in the Court of Appeals printed appendices setting forth selected portions of the reporter's record. The appendix to appellants' brief was divided by subject matter into items with each item given a number. The appellants' appendix is referred to herein as "App. Item " followed by the number of the item and the page numbers in said appendix.

[3]Prior to trial, the petitioners were confined to jail for approximately four and one-half months before reasonable bail was granted (*Stack v. Boyle,* 192 F.2d 56; *Stack v. Boyle,* 342 U.S. 1; *United States v. Schneiderman, et al.,* 102 F.Supp. 52; *United States v. Spector,* 102 F.Supp. 75; *Stack v. United States,* 193 F.2d 875; *Spector v. United States,* 193 F.2d 1002). The same trial judge presided at the bail proceedings and at the trial herein.

tioners for judgments of acquittal at the close of respondents' case and at the conclusion of the entire case were denied (106 F. Supp. 906, 920-924; R. 9384-9993, 10076-10077, 12569-12576, 13915-14072).[4]

The case was submitted to the jury by the District Court without any finding of "clear and present danger," other than the Court's holding that the individual specific intent had been sufficiently established for submission to the jury. In its written opinion, the District Court held that the clear and present danger rule is intended to serve as the standard to be applied in testing the constitutionality "on its face" of a statute which restrains freedom of expression, and that in determining "whether the statute is constitutionally applied to a given case, the 'clear and present danger' rule furnishes the standard whereby to gauge the sufficiency of the evidence as to the state of mind or intent of the accused." (106 F. Supp. 906, 923).

Both the petitioners and respondent requested the District Court to instruct the jury that they could not return a verdict of guilt unless the jury were satisfied beyond a reasonable doubt that the petitioners conspired as alleged in the indictment with the intent that their alleged teaching and advocacy be of a rule or principle of

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[4]The exhibits admitted into evidence exceeded 500 in number and included many full length books. The Court of Appeals pursuant to stipulation of the parties and its order based thereon considered the exhibits on appeal in their original form without printing or reproduction. Copies of the reporter's transcript were prepared by a process known as photo offset printing and these copies were by order of the Court of Appeals accepted as the reporter's record on appeal without further printing. The letter "R" refers to the photo offset copies.

action and by language reasonably and ordinarily calculated to incite persons to such action (Pet Prop. Inst. Nos. 25, 29, 51, App. Item 2 (q), pp. 69, 73-4, 76; Resp. Prop. Inst. No. 21, Supp. App. Item 28, pp. 35-6).[5] The District Court declined to give the jury any instruction on "incitement". The District Court expressed the view that in *Dennis*, this Court held that advocacy of forcible overthrow of the Government with intent to accomplish such overthrow as speedily as circumstances would permit had been constitutionally proscribed by Congress. Whether such evidence "is of the degree that amounts to incitement, whether it is something else, might be one way of characterizing the evidence, but I don't think it would help here", stated the District Court (R. 9693). The District Court thought that the question of "incitement" may "have been important in the Dennis case, but I think that question is laid at rest by the Dennis case" (R. 9693). In the District Court's view, the question was merely one of quantum of proof. "What is the language that is incitement to action? That means anything at all to me. I don't know what it would mean to the jury" (R. 12441-3). The District Court held that the question for the jury was whether there was an agreement to advocate and teach the forcible overthrow of the Government with the proscribed intent, "whether it is language of incitement or not" (R. 12443).

The District Court instructed the jury over petitioners' objections: "The verb 'organize' as used in the Smith Act and the indictment, includes the recruiting of

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[5] "Supp. App." refers to the supplemental appendix filed in the Court of Appeals by petitioners together with their reply brief.

new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization" (App. Item 2(g), pp. 36-7). The Court declined to instruct the jury as requested by petitioners: "To 'organize' means to furnish with organs, to give an organic structure to. To organize means to bring into existence and is a very different thing from extending the limits of an organization or adding to or increasing its size." (Pet. Prop. Inst. 34, Item 2(g), pp. 37-8).

In the courts below petitioners repeatedly contended that the evidence was insufficient to establish petitioners' intent or connection with a conspiracy as charged in the indictment.[6] In the Court of Appeals both petitioners and respondent set forth in their briefs detailed statements of all the evidence in the record as such evidence related specifically to each of the petitioners herein. These statements, as set forth in respondent's brief below, are appended to the petition here (App. C), with only such interpolations and italics as will help to clarify a reference

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[6]Petitioners rely on the language of this Court in *Dennis*: "Where there is doubt as to the intent of defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." 341 U.S. at 516. When this specific language was called to the attention of the trial judge on motions for judgment of acquittal, the trial judge stated: "This does not mean a thing to me, Mr. Margolis. With all deference, it is not understandable to the lawyer. They are words; they are very kind words and they are all right. I have no quarrel with them at all, but they do not mean a thing in my view to advance the holding in the case . . . but we must remember that the justices of the Supreme Court . . . write a great many words, sometimes that are not necessary to the decision." (R. 9680).

to the record, correct an error, or avoid an apparent distortion.

The evidence relating directly to the individual petitioners establishes that each of them had been a member of the Communist Party for many years and had held some office in the Party, for the most part on a local level. (Of the eleven petitioners, five never held an office above the city or county level and four never held one above the state level.) On the issue of advocacy of force and violence the record contains nothing more than evidence of a few unrelated diverse and unequivocal statements made by several of the petitioners outside the presence and without the knowledge of most of the others. Our Appendix E summarizes in tabular form the positions held by each petitioner in the Communist Party and the evidence from which it is claimed that any inference could be drawn of adherence to doctrines of force and violence. This evidence consists of utterances, verbal or written, relating to revolution and of utterances and the use of books dealing with Marxism and Leninism. The table indicates which of the utterances and of the use of books were ascribed directly to each petitioner and which of them were related to him by reason of his presence at public or private meetings at which the statements were made or the books used by others.

The Court of Appeals discussed only the evidence relating to one petitioner, Henry Steinberg. It held that the evidence was sufficient against him in all respects and that the evidence as to all of the petitioners was equally sufficient. Petitioner Steinberg was shown to have been a member of the Young Communist League

as early as 1936 and of the Party in 1940, at which time he was the "practical politician" of the Party (A. 247-8). He held the following positions in the Party; in 1946 or 1947, Educational Director for Los Angeles County (A. 138-9); in 1950, Legislative Director of Los Angeles County (Ex. 517; A. 455).

There is no evidence in the record tying petitioner Steinberg into any advocacy of force and violence and there is none relating to any reading or discussion of Marxism-Leninism by him or of his understanding thereof. In the opinion of the Court of Appeals there is reference to only one specific item of evidence, summarized in the opinion as follows:

> "To take one example, the indictment charged, as mentioned above, one such act in the following language:
>
> > 'On or about January 21, 1949, Henry Steinberg, a defendant herein, did attend and participate in a meeting.'
>
> The proof showed that the meeting was called for several purposes, as outlined below. Steinberg made a number of speeches there, and stated that 'this was a Lenin Memorial meeting,' at which he presided. An announcement of the meeting in the People's World asked persons to attend and 'demonstrate for the Bill of Rights' as it would 'serve primarily as a protest against the current trial in New York of twelve national leaders of the party.' There was no question about the facts, which were uncontroverted, if the jury believed the testimony." (Appendix A, p. 23).[7]

[7]Appendix A contains the opinion of the Court of Appeals below.

This evidence was held to constitute sufficient evidence of petitioners' intent and connection with the alleged conspiracy as well as proof of an overt act. It should be emphasized that the aforesaid was all the evidence against petitioner Steinberg. To set forth the detailed evidence relating to each of the other petitioners would unduly prolong the statement of the case. The specific evidence as to each petitioner will be discussed in the portion of the argument, Point III, dealing with the sufficiency of the evidence. And as noted above the respondent's complete summary thereof can be found in Appendix C and a quick view of all the material evidence as to each petitioner can be obtained in chart form in Appendix E.

The evidence with respect to petitioner Steinberg, discussed by the Court below and held sufficient to provide the basis for inferences establishing every element of the crime charged without overreaching the limitations of the First Amendment, sharply poses several of the issues of law presented by this petition. In this connection it is interesting to note that the Court of Appeals indicates in its opinion that the constitutional questions posed by this case are the same as those which were raised by the Sedition Law of 1798 (App. A, 41-2). Assuming the constitutionality of the latter the Court holds that the convictions here must stand on the same principles.[8]

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[8]Cf. "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the courts. I had conceived that the United States through many years had shown its repentance for the Sedition Act of July 14, 1798 (1 Stat. at L. 596, Chap. 74) by repaying the fines that it imposed." Mr. Justice Holmes dissenting in *Abrams v. United States*, 250 U.S. 616, 630.

Evidence was introduced with respect to only two of the overt acts charged to have taken place within three years of the indictment. They both involved public Lenin Memorial meetings. At one the subject matter of the meeting was a protest against the prosecution in the *Dennis* case (see supra p. 13). At the other petitioner Schneiderman spoke upon "the subject matter of the event being a Lenin memorial" (R. 8063). A subsequent issue of the People's World (Ex. 159-A) stated that nearly 2000 persons had attended the meeting, that appellant Schneiderman spoke on the "China situation", that China was seen as the "key issue for 1950"; that the people demand to know the stand of Senator Downey and Congresswoman Douglas "on the vital issue of whether they support trade and recognition for the new China, or armed intervention" (R. 8057-66).

The Court declined to instruct the jury "that if the evidence is as consistent with the hypothesis that the 'overt act' is merely the exercise of speech, press, and assembly as with the intention to advocate and teach or accomplish the overthrow of the Government of the United States by force and violence as speedily as circumstances would permit", then the "overt act" cannot be said to have been proven to be in furtherance of the alleged conspiracy beyond a reasonable doubt (App. Item 2(e), pp. 25-6). The District Court refused to instruct the jury that mere proof of participation "in the Communist Party's lawful activities" was not proof of an "overt act"; that if the proof showed no more than the exercise by petitioners "of lawful discussion by speech and press", and "peaceable assembly and association to

seek redress of grievances", then the "overt acts" had not been established (Pet. Prop. Inst. 39, 40, 41, 42, 43, 44; App. Item 2(e), pp. 26-9).

The District Court simply instructed the jury that an "overt act" under the indictment herein "need not be criminal in nature", and may be "as innocent as the act of a man walking across the street", so long as the "act" tends to accomplish the plan or agreement and is knowingly done in furtherance of "an object or purpose of the conspiracy charged in the indictment" (App. Item 2(e), pp. 24-5).

On the afternoon of July 29, 1952, just as counsel for petitioner concluded their final arguments to the jury and on the eve of arguments by respondent counsel, there appeared in the press and on radio and television, announcements that "a long secret FBI report" had just been released purportedly proving that the Party advocates and teaches the overthrow and destruction of the Government of the United States by force and violence. Before the day's proceedings had ended and before the jury had left the courtroom, there were already being sold at every exit of the Federal Court Building issues of the Herald-Express, an evening newspaper distributed in Los Angeles (circulation 305,056), with banner headlines printed in red, reading, "FBI Bares Stalin U. S. Revolt Plot". The article itself was headed, "Armed Revolt Plot Told" (Ex. NG R. 13647).

Throughout the evening, announcements of a similar nature emanated from all radio and television stations in the Los Angeles area. The commentators on radio and television emphasized that the "long secret FBI report"

revealed that Russian Premier Stalin had decided that Communists can climb to power in the United States only by "forcible destruction" of the Government—never by peaceful means; that the purpose of the FBI report, heretofore considered "highly confidential" was to set forth "documentary proof that the Communist Party, U.S.A. teaches and advocates the overthrow and destruction of the United States Government by force and violence" (Ex. NG R. 13647).

On the morning of July 30, 1952, the banner headline of the Los Angeles Times (circulation 396,112) read: "Stalin Plan to Conquer U. S. Told in FBI Report." The Mirror (circulation 202,325) carried the headline: "FBI Reports Reds Seek to 'Kill' U. S." (Ex. NG R. 13647).

This publicity was predicated on a report which had been prepared by the FBI and turned over to Senator McCarran in June 1952 and then released by the Senator to the press on the day that appellants were finishing their final arguments to the jury (Ex. NF R. 13646; App. Item 78, pp. 301-6). Petitioners immediately moved for a mistrial (Ex. NG R. 13647, Ex. NF R. 13645-7). The District Court indicated that it was willing to put one and only one, compound question to the jury as to whether they had seen or heard this story and if so, whether it had affected them in such a way that they would disregard their sworn duty to decide this case solely upon the evidence adduced, the jurors' answers to this one question to be accepted as final by the Court. Petitioners objected to this procedure. The Court put no question at all and denied the motion for a mistrial (R. 13, 691-13,

724). An instruction to the jury directing it specifically to disregard these publications was refused (Def. Prop. Spec. Inst., Ex. NH App. Item 2(q), p. 69).

A few days before the case went to trial, the Los Angeles Times commenced the publication of a serialized story entitled "I Led Three Lives" by one Herbert Philbrick. The announcement was in banner headlines, and described Philbrick as one "whose electrifying testimony before Judge Howard Medina is generally conceded to have been instrumental in the conviction of the notorious 'Communist 11'". Readers were informed that "he reveals how the Communists intend to overthrow the U. S. Government and when". A motion for a continuance until 60 days after the conclusion of the publication was denied (R. 987-8).

The trial judge instructed the jury that in evaluating testimony given by former members of the Party, consideration should be given to their possible hostility to the defendants or the Party (Inst. No. 6B, App. Item 1, p. 10). Most of the principal prosecution witnesses had joined the Party as paid FBI agents. Accordingly the petitioners requested, but the trial Court refused, an instruction that the testimony of these witnesses should be scrutinized closely and acted upon with caution (Proposed Inst. No. 70, App. Item 2(q), p. 80).

ARGUMENT.

The Court of Appeals has rendered a decision in conflict with decisions of the Court of Appeals in *Dennis v. United States*, 183 F. 2d 201 (C.A. 2, 1950), and *Frank-*

feld v. United States, 198 F. 2d 679 (C.A. 4, 1952) on the same matters; has decided important questions of federal law which have not been, but should be, settled by this Court; has decided federal questions in conflict with the decisions of this Court in *Dennis v. United States,* 341 U.S. 494, *DeJonge v. Oregon,* 299 U.S. 353, *Herndon v. Lowry,* 301 U.S. 242, *Stromberg v. California,* 283 U.S. 359, and other applicable decisions of this Court; and by its decision and judgment has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

I.

THE SMITH ACT, AS CONSTRUED AND APPLIED TO THE CASE AGAINST THESE PETITIONERS BY THE COURTS BELOW, VIOLATES THE PROVISIONS OF THE FIRST AMENDMENT WITH RESPECT TO THE ISSUES OF INCITEMENT AND CLEAR AND PRESENT DANGER. THE DECISION OF THE COURT OF APPEALS WHICH AFFIRMS THE JUDGMENTS OF CONVICTION AND THE RULINGS OF THE TRIAL COURT ON THESE ISSUES, IS IN CONFLICT WITH THE DECISION OF THIS COURT IN DENNIS.

In *Dennis v. United States,* 341 U.S. 494, 502, this Court stated that although the application of the Smith Act to the defendants in the *Dennis* case had resulted in convictions for the teaching and advocacy of the forcible overthrow of the Government, coupled with the intent to accomplish that overthrow, still "an element of speech" was involved. "For this reason, we must pay special heed

to the demands of the First Amendment marking out the boundaries of speech."

The statute was held properly construed and applied in the light of the requirements of the Constitution upon proof beyond reasonable doubt that (1) each of the accused knowingly and wilfully conspired to advocate and teach the overthrow of the Government of the United States by force and violence and to organize as the Communist Party of the United States a society, group or assembly of persons who so teach and advocate (p. 496-7); (2) each of the accused conspired as aforesaid with the specific intent to overthrow the Government of the United States by force and violence as speedily as circumstances would permit (pp. 499-500, 515-16); (3) each of the accused so unlawfully conspired with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action (pp. 511-13); and that (4) the aforesaid conspiracy accompanied by such specific unlawful intents, involving defendants proven to have the "power to bring about the evil" coupled with "the inflammable nature of world conditions", justified a finding of "clear and present danger", as defined by this Court, of an attempt to overthrow the Government of the United States by force and violence (pp. 502-11).

All of the aforesaid criteria were either abandoned or undermined by the courts below in the instant case. The Smith Act, as construed and applied in the instant case, "amounts merely to a dragnet which may enmesh anyone" who advocates and teaches basic social, economic or

political changes. *Herndon v. Lowry*, 301 U.S. 242, 263. The construction and application of the courts below are in fundamental conflict with the construction and application of the statute made by this Court in *Dennis* and by the Courts of Appeal in *Frankfeld v. United States*, 198 F. 2d 679 (C.A. 4, 1952). Cert. den. 344 U.S. 922 and *Flynn v. United States*, 216 F. 2d 354 (C.A. 2 1954) Cert. den. 348 U.S. 909.

A. The rulings of the courts below that the Smith Act punishes advocacy and teaching of the forcible overthrow of the Government with unlawful intent whether in language of incitement to action or not constitutes an unlawful and unconstitutional construction and application of the statute contrary to the decision of this Court in Dennis and a violation of the rights guaranteed petitioners by the provisions of the First Amendment.

1. On at least three separate occasions, the trial judge instructed the jury that they could convict petitioners if they found that petitioners knowingly and wilfully joined the conspiracy alleged in the indictment with the proscribed mental state (Instructions 11-I, 14 and 14-H; App. Items 2(f), (h) and (l), pp. 29, 40 and 53-4). The refusal to instruct the jury on the question of "incitement to action" was intentional and over the specific objection of petitioners on motions for judgment of acquittal (R. 9393); and with respect to petitioners' proposed instructions (Nos. 25, 29, 51; App. Item 2(q), pp. 69, 73-4, 76). Moreover, respondent itself requested the trial judge to instruct on the issue, employing the language of Judge Medina's instruction in *Dennis* (Supp. App. Item 28, pp. 35-6). None of the instructions was given.

More than a mere failure to give requested instructions is involved here. The proper construction and application of a statute in the light of the requirements of the Constitution is in issue. In *Dennis*, the trial judge instructed the jury "in further construction and interpretation of the statute" that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by the Smith Act, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. 9 F.R.D. 367, 391. Judge Learned Hand thought that the Smith Act was constitutional "as the judge construed it" (183 F. 2d 201, 207). Judge Chase, in his concurring opinion, stated that the construction of the Act was "demanded" in the light of prior decisions by this Court and to avoid constitutional difficulties. On certiorari to this Court, respondent in *Dennis* quoted in its brief in full only the instructions of the trial judge on "incitement" (pp. 165-8). In this Court, Chief Justice Vinson wrote that the instructions of the trial judge called for the jury to find the facts "essential" to establishing the substantive offenses which defendants allegedly conspired to commit. 341 U.S. 494, 512. Justice Frankfurter held that the "judge's charge (that the act is directed at advocacy of "a rule of action, by language reasonably calculated to incite persons to such action") properly explained to the jury what it is that the Smith Act condemns" (p. 518). Justice Jackson expressed the view that the statute proscribed "direct incitement" to action and accordingly could support a conviction without proof of clear and present danger (pp. 571-2).

Our reading of the concurring opinion of Mr. Justice Frankfurter, leads us to the conclusion that the distinction between discussion and incitement is at the heart of that Justice's concurrence. He noted (p. 544) that the "jury (in *Dennis*) has found that the object of the conspiracy is advocacy as 'a rule or principle of action', 'by language reasonably and ordinarily calculated to incite persons to such action', and with the intent to cause the overthrow 'as speedily as circumstances would permit'.

"On any scale of values which we have hitherto recognized, speech of this sort ranks low."

In the instant case the jury was not required by the trial Court to make any such findings; and that jury did *not* make such a finding.

Judge Dimock in *United States v. Flynn* (D.C.S.D.N.Y. 1953 C. 137-7), specifically instructed the jury that the defendants could not be found guilty of the offense absent the intent that the teaching and advocacy invoked "be of a rule or principle of action, and by language reasonably and ordinarily calculated to incite persons to such action". In *Frankfeld v. United States*, 198 F. 2d 679, 687 (C.A. 4, 1952), the Court of Appeals quoted with approval the instruction of Judge Chesnut that advocacy of violent revolution is not unlawful so long as it "does not go to the extent of advocating action for the accomplishment of a violent revolution by language reasonably and ordinarily calculated to incite persons to such action".

There is no relevant decision of this Court which has failed to stress the distinction between statutes which permit the punishment of expressions of ideas and those which are limited to incitement to violence and crime.

Stromberg v. California, 283 U.S. 359, 369; *Near v. Minnesota,* 283 U.S. 697, 716; *Gitlow v. New York,* 268 U.S. 652, 661-5; *DeJonge v. Oregon,* 299 U.S. 353, 363-6; *Herndon v. Lowry,* 301 U.S. 242; 261; *Taylor v. Mississippi,* 319 U.S. 583, 589; *Terminiello v. City of Chicago,* 337 U.S. 1, 4; *Association v. Douds,* 339 U.S. 382, 394. Professor Chafee states: "The real issue in every free speech controversy is this—whether the state can punish all words which have some tendency, however remote, to bring about acts in violation of law, or only words which directly incite to acts in violation of law." *Freedom of Speech* (1920) p. 25. In *Masses Publishing Co. v. Patten,* 244 Fed. 535, 540, Judge Hand noted: "Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists."

The trial judge here clearly and unmistakably excluded the issue of "incitement to action" from the case. The jury was left free to convict the petitioners even if they allegedly conspired to advocate and teach in the future, the abstract doctrine of the forcible overthrow of the Government without incitement to action. The Smith Act was thus construed so as to permit the jury to convict even if petitioners allegedly conspired to advocate and teach the proscribed doctrine in language which was merely provocative or challenging or stirring or disputatious. The Smith Act as thus construed and applied

is in conflict with the decisions of this Court and is unconstitutional. *Dennis v. United States*, 341 U.S. 494, 501-3, 511-13, 516, 548-9; *Terminiello v. City of Chicago*, 337 U.S. 1.

2. The opinion of the Court of Appeals recognizes the plain state of the record as made by the trial judge and concludes that the requested instructions were unnecessary (Appendix A, pp. 6, 7). The instant indictment, it is stated, "by its inherent terms charged not only that the language of incitement was used, but it was used in order that the proscribed doctrine should become a rule of action" (id., p. 16). There is nothing in the language of this indictment which suggests that "incitement to action" is inherently contained therein. This Court in *Dennis*, and the courts in *Flynn* and *Frankfeld* emphasized that the abstract doctrine of the forcible overthrow of the Government is not interdicted by the Smith Act. A charge that an accused advocated the overthrow of the Government by force and violence does not preclude advocacy of that abstract doctrine and cannot, therefore, "inherently" connote that the accused so advocated with the intent that such advocacy be of a rule or principle action and by language reasonably and ordinarily calculated to incite persons to such action. It was precisely for this reason that this Court approved the "essential" instructions of Judge Medina in "further construction and interpretation of the statute."

Assuming that the element of incitement was "inherent" in the indictment, the duty rested upon the trial judge to instruct the jury clearly and unequivocally on the issue. As this Court noted in *Dennis*, the issue is one of the

most important "questions of fact" which the jury in a Smith Act prosecution has to decide, for upon the determination of that issue rests the power or lack of power of the court to apply the law to the accused in the light of the protective guarantees of the Constitution. Where the Constitution or the Congress prescribes standards affecting the conduct of persons, an accused is entitled to have the jury instructed in accordance therewith. *United Brotherhood v. United States,* 330 U.S. 395; *Bollenbach v. United States,* 326 U.S. 607; *Screws v. United States,* 325 U.S. 91, 107; *Terminiello v. City of Chicago,* 337 U.S. 1; *St. Paul L. & M. Ins. Co. v. Bachman,* 285 U.S. 112.

Another reason advanced by the Court of Appeals to justify the failure of the trial judge to instruct on the question of incitement was the view "that an unlawful combination and agreement becomes a positive crime only when some of the proved conspirators enter the field of action pursuant to the criminal design. Therefore, if the conspiracy did not become a rule of action pursuant to the proscribed intent, there would have been no violation of the conspiracy statute" (Appendix A, p. 32). If the "criminal design" involved advocacy by language reasonably and ordinarily calculated to incite persons to action, the petitioners were obviously entitled to have the judge charge, in unmistakable language, that no petitioner here could be found guilty unless he was a party to such a criminal design. *United States v. Ausmeier,* 152 F. 2d 349, 356 (C.A. 2, 1945). If there was no such "criminal design", the mere fact that one of the accused entered the "field of action" would not make criminal the agreement which was not criminal in its inception.

3. In the Court of Appeals, respondent, confronted by the trial judge's specific exclusion of the question of incitement from the case, argued that "we must assume" that the jury could not have found that petitioners intended their advocacy "would be in language less compelling than that which would incite persons to action" (Res. Br. pp. 351-3). The Court of Appeals, after quoting extracts from the trial judge's instructions, adopted a similar view: "Defendants were convicted of something very different from the use of speech, assembly or publication" (Appendix A, pp. 42-46).

That a trial judge must instruct on all essential questions of law involved in a case is of course settled. The judge may not transfer to the jury the judge's function in giving the law, nor may an Appellate Court assume the jury's function of measuring the evidence by appropriate legal yardsticks. The Court is required to instruct what the law condemns without offending the Constitution; not what the Constitution permits even if the law were nonexistent. On a basic issue of fact, an instruction should be so plain that no doubt can arise as to its meaning. *United Brotherhood v. United States,* 330 U.S. 395; *Bollenbach v. United States,* 326 U.S. 607; *Terminiello v. City of Chicago,* 337 U.S. 1; *Kraus & Bros. v. United States,* 327 U.S. 614, 627; 53 *Am. Jur.,* "Trial" Section 545, p. 434.

The jury was instructed that it could convict if it found that petitioners committed the broad offense alleged in the indictment. 106 F. Supp. 906, 933-34, 936, 938. The jury was not told that the Smith Act does not punish the advocacy or teaching of the abstract doctrine

of forcible overthrow of the Government; that the law punishes only advocacy and teaching of such proscribed doctrine as a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, nor was any equivalent language used in the trial judge's instructions. The matter was entirely excluded from the jury's consideration because of the fundamental conflict in the construction of the statute by the courts below and this Court in *Dennis*.

"Advocacy", the jury was instructed, is the same as "urge" *or* "plead in favor of" *or* "support, vindicate, or recommend publicly". "Teach" means "to instruct", "show how", *or* "guide the studies of" (106 F. Supp. 906, 934). *Any such advocacy or teaching* of the forcible overthrow of the Government with the requisite specific intent was sufficient, under the instructions, to justify a conviction. It is submitted that the jury could not be expected to understand under such instructions that a conviction would only be justified under the statute if there was proof beyond a reasonable doubt that each of the petitioners knowingly and wilfully joined a conspiracy to advocate and teach the proscribed doctrine in language of incitement to action. Nor could this understanding be obtained from instructions which informed the jury that petitioners may advocate "socialism" or any other "economic or political or social doctrines", or "criticize our system of Government" or "foreign policy" in "crudely intemperate language" (106 F. Supp. 906, 935). Nor was anything added by the negative definition that advocacy or teaching does not include prediction or prophecy, or that any advocacy or urging which did not

include the use of force and violence as a means of overthrowing the Government was not within the issue of the indictment. Because the jury was never told that the "advocacy" or "urging" or "pleading" or "recommending" of the proscribed doctrine must be of a rule or principle of action in language calculated to incite persons to such action, it was left free to convict solely because of "the use of speech, assembly or publication".[9]

The rulings of the Courts below violate basic provisions of the Constitution and are in direct conflict with the principles enunciated by this Court in *Dennis*. Such definitive decisions, if not reviewed by this Court, will have serious and harmful results not only in Smith Act prosecutions involving conspiracy charges as well as charges of substantive violations, but will necessarily affect prosecutions under all other federal, state and local laws relating to the exercise of First Amendment rights.

B. The premises which led the Courts below to reach a new and different construction of the Smith Act in violation of the Constitution are unsound and should be reviewed.

(1) It appears to be the view of the Court of Appeals that the indictment in *Dennis* did not plead a "standard" conspiracy (as Mr. Justice Jackson erroneously assumed, according to the Court below); that "it is clear" from the

[9]The editors of United States Law Week construe the opinion of the Court of Appeals as follows: "Smith Act indictment charging that defendants have conspired, with specific objective of causing forcible overthrow of Government, to organize group dedicated to advocacy and teaching of such overthrow adequately defines criminal conspiracy *even if planned advocacy and teaching are protected by First Amendment.*" 23 L.W. 2477 (March 29, 1955).

opinion of the other Justices of this Court that "a true conspiracy charge was not involved" (Appendix A, p. 12). In *Dennis*, states the Court of Appeals opinion, "mere membership or officership in the Communist Party, insofar as that organization was shown by the evidence to teach the proscribed doctrine, might have been taken as proof against the individual defendant of joint action with others to bring about the end intended" (id., p. 5); and this Court in *Dennis*, is said to have "applied the law without any of the limitations set up by the precedents which have been developed under Section 371 (the general conspiracy statute, 18 U.S.C.A. 371)" (id., p. 12).

On the other hand, states the Court below, since the decision in *Dennis* there have been "changes in the basic law" (id., p. 7), "by far reaching legislation" and, as a result, "there are vital distinctions between this case and those which have been previously ruled upon" (id., p. 7). It appears that the "vital distinction" is that *Dennis* was decided under 18 U.S.C. (1946 Ed.), Sections 10 and 11, while the instant case was tried under 18 U.S.C. (1948 Ed.), Sections 371 and 2385. Therefore, Congress discarded the "vague 'conspiracy' clause of the original statute", and made possible use of "the standardized body of law with which the profession was familiar" under a "specific enactment proscribing conspiracy as a substantive offense" (Appendix A, p. 11).

As a result of this change in the "basic law", certain "striking phrases given currency in the trial of the Dennis case" need no longer be used "in all future cases" (id., p. 4). The instructions of the trial judge in *Dennis* requiring the jury to find "language of incite-

ment" and intent that the advocacy or teaching be of a "rule of action" appear to the Court below to have been only "precautionary instructions" because the then statute required "neither proof of overt acts nor a specially planned objective" (id., p. 6). However, under the present "conspiracy statute", admonitions to a jury in such language have become "supererogatory" (id., p. 7).

There is no basis for the distinction which the Court below seeks to draw. There is nothing to indicate that the 1948 version and codification of the Criminal Code was intended by Congress to create any "basic changes" with respect to a charge of conspiracy to violate the Smith Act. 80th Congress House Report No. 304. The Reviser's Note to Section 2385 of Title 18 U.S.C. states that "the phraseology was considerably changed to effect consolidation but without any change of substance". The Reviser's Note to Section 371 of 18 U.S.C. states "that a number of special conspiracy provisions, relating to specific offenses, which were contained in various sections incorporated in this title, were omitted because adequately covered by this section".

Moreover, in *Dennis* as in the instant case, the gist of the offense charged was the alleged conspiracy to advocate and teach the forcible overthrow of the Government, and to organize as the Communist Party a society of persons for such purpose. The conspiracy was no less "standard" in *Dennis* than it was here. *Dennis v. United States*, 341 U.S. 494, 511, 517, 544; 572, 579, 582; *United States v. Dennis*, 183 F. 2d 201, 230, 235 (C.A. 2, 1950); *United States v. Foster*, 9 F.R.D. 373, 376-78 (D.C.N.Y. 1949).

The only effect of the 1948 revision of the Criminal Code was to make the general conspiracy statute with its requirement of allegation and proof of overt acts applicable to prosecutions under the Smith Act. This additional requirement is what the Court below denominated a "deep gulf between the situation here and that in the Dennis case" (Appendix A, p. 14). This Court did not construe and apply the Smith Act in *Dennis* as it did because the indictment did not allege "overt acts" (pp. 497-498, 510-11). The requirement that there be allegation and proof of an overt act to further and effectuate the objects of an alleged conspiracy has important historical roots and is undoubtedly a salutary requirement in the prosecution of this "mental crime", but "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects . . . it is in either case that agreement which constitutes the conspiracy which the statute punishes". *Braverman v. United States*, 317 U.S. 49, 53. The conclusion, therefore, that the nature of the offense charged herein was basically different from the offense charged in *Dennis* so as to justify an interpretation and construction of the statute which disregards constitutional limitations imposed by the First and Fifth Amendments is without foundation.

2. In the view of the Court of Appeals, not only are the statutes different in *Dennis* and in the case herein, but the indictments are also fundamentally distinct. It appears that a "chemical change was wrought" (Appendix A, p. 15) when, upon motion of petitioners, the original indictments were dismissed and a new indictment returned

with the allegation of specific intent of causing the forcible overthrow of the Government "as speedily as circumstances would permit". In *Dennis*, this Court held that the structure and purpose of the Smith Act demand the inclusion of intent as an element of the crime (p. 499). The trial judge here out of "caution added to grave doubt" (102 F. Supp. 87, 97) required the prosecution to add explicitly to the indictment that which was implicitly imbedded in the *Dennis* indictment. Clearly, this did not change the essential character of the offense nor bring about a "vital metamorphosis" (Appendix A, p. 15).

3. Although the Court of Appeals recognized that the case herein was tried on the theory that "this was a conspiracy to violate the Smith Act", still it appears to the Court below that only "purists might find a difference" between a conspiracy to advocate and teach the forcible overthrow of the Government with intent to accomplish that overthrow as speedily as circumstances permit (18 U.S.C. Section 2385) and conspiracy to forcibly overthrow the Government (18 U.S.C. Section 2384), (id., p. 15, note 9). It is stated that "the latter statute which was mentioned in the *Dennis* case (pp. 581-2) might well be applicable to the indictment here" (id.). This may explain such language in the opinion as "if conspirators *to commit a crime of violence* are charged with the use of speech or of writings or of meetings in order to obtain confederates, nothing further would be required than here contained" (id., p. 16).

The petitioners here were not charged with a conspiracy to forcibly overthrow the government. Affirmance of the judgments of conviction on such theory would be a

sheer denial of due process. The Court below appears to assume because the indictment alleged the proscribed mental state that therefore the objects of the conspiracy alleged in the indictment were enlarged to include actual forcible overthrow of the Government. The administration of criminal justice would become "at large" if a specific conspiracy with defined objects alleged in an indictment were to be stretched to include the subjective motives of the alleged conspirators. Cf. *Krulewitch v. United States,* 336 U.S. 440; 443-4, 456-7.

4. Similar fundamental misconceptions bottomed the rulings of the trial judge below which are discussed in the argument hereafter.

It is respectfully submitted that the conclusions of the Courts below were based on premises wholly unsupported in law or fact. In addition to the serious constitutional errors which flowed from the misconceptions in this case, it should be noted that the reasons given by the courts below for their rulings raise important questions in the administration of the Smith Act and criminal justice in the Federal Courts as to call for this Court's review and exercise of its power of supervision. The concept of a "new Smith Act" and "standard conspiracy" without the issue of "incitement" injects novel elements into future prosecutions which may confuse and puzzle prosecutors and defense counsel, as well as judges and juries, alike. In the light of the recent announcements by the Department of Justice that a host of new Smith Act prosecutions are immediately contemplated, the issues involved in the instant proceedings become of crucial im-

portance. *New York Times,* January 27, 1955, p. 12, col. 6; *New York Times,* April 11, 1955, p. 3, col. 1.

C. The failure of the trial Court to submit the issue of incitement to the jury, the equation of specific intent with clear and present danger, the exclusion from consideration by the trial Court and jury of petitioners' "power to bring about the evil" and the "nature of their activities", all constituted in totality an abdication of the Court's duty to determine the issue of "clear and present danger" upon which the application of this statute to petitioners under the Constitution depended.

1. In *Dennis,* Judge Hand stated that "it is of course true that the degree of probability that the utterance will bring about the evil is a question of fact" (183 F. 2d 201, 215), upon which the question of law to be decided by the Court was dependent, and that in the application of the "clear and present danger" standard, as defined, courts "may strike a wrong balance; they may tolerate 'incitements' which they should 'forbid'; they may repress utterances they should 'allow' but that is a responsibility that they cannot avoid. Abdication is as much a failure of duty, as indifference is a failure to protect primal rights" (id., p. 212). This Court in *Dennis* held that "when facts are found" by the jury that establish the violation of the statute, then the application of the statute under the First Amendment becomes a matter of law, and the determination of this question depends upon the judicial "application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction" (341 U.S. 494, 514-15). This Court emphasized: "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to

bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution'' (p. 516), reiterated in proceedings affecting the case herein. *Stack v. Boyle*, 342 U.S. 1, 5.

2. The failure of the trial Court to submit to the jury the issue of ''incitement'', approved by the Court of Appeals, resulted in the absence of a jury finding essential to the determination of ''clear and present (or probable) danger''. It made any finding on ''clear and present danger'' by the courts below legally impossible. Without an appropriate holding of ''sufficient danger'', denial of the motions for judgments of acquittal was invalid under the Constitut n.

3. The Court of Appeals was in error when it stated that the ''trial judge did not rule that clear and present danger could be found to exist simply upon the basis of the possession of the proscribed intent'' (Appendix A, p. 33).

The trial judge twice stated in written opinions that the ''clear and present danger'' envisioned in the Smith Act is the ''intent (of the advocate) to bring about ultimately the overthrow of Government by means of force and violence as speedily as possible'', 102 F. Supp. 87, 96; 106 F. Supp. 906, 923. This was the only ruling on clear and present danger made by the trial judge in the case. Contrary to the view of the Court of Appeals, petitioners were not seeking a ''comment'' by the trial Court to the jury on the evidence (Appendix A, p. 30). Petitioners were seeking a necessary determination of law on the evidence.

The errors of the Court of Appeals appear to flow from its agreement with the trial Court that proof of an alleged conspiracy to advocate and teach the proscribed doctrine with unlawful intent was sufficient in itself to establish a clear and present danger. "The instructions of the trial Court clearly show that, if the jury convicted under the rules of law there laid down, they would have necessarily found a clear and present danger existed" (id., p. 30).

This Court has held that the "danger" test is ultimately a question of law for the Court; the issue of intent is a question of fact for the jury (249 U.S. 47, 51-2). Justices Holmes and Brandeis in their dissents stated that these two elements, one subjective and the other objective, are constitutionally distinct. *Pierce v. United States*, 252 U.S. 239, 271. This distinction was reemphasized by this Court in *Hartzel v. United States*, 322 U.S. 680.

In *Dennis*, Judge Medina instructed the jury that only if it returned a verdict of guilt on conspiracy, intent and incitement, could he legally support his ruling of "danger". 9 F.R.D. 367, 391-2. In the Court of Appeals in New York, the "purpose of the utterer" was held distinct from the question of whether the nature of the utterances and the circumstances under which the utterances were made constituted a "probable danger". 183 F. 2d 201, 212. In this Court, "intent" was held to be an essential element of the crime (341 U.S. 494, 499), but this Court said that despite the findings of the jury on this issue, ". . . the Court *must* examine judicially the appli-

cation of the statute to the *particular situation*, to ascertain if the Constitution prohibits the conviction'' (id. p. 514) (emphasis added).

Clearly, in the light of the aforesaid, the trial judge was in fundamental error when it equated unlawful mental state with ''clear and present danger'', and refused to make any other ruling thereon.

4. The error in the equation of ''intent'' with ''danger'' led the trial judge to exclude any consideration of the power of the petitioners to bring about an attempt to forcibly overthrow the Government or of the nature of their activities. In *Dennis* Judge Hand stressed that the defendants were found to be the ''controlling spirits'' of the Party (183 F. 2d 201, 212). This Court, in determining whether ''the trial judge's treatment of the issue was correct'' (341 U.S. 494, 511) observed that defendants ''by virtue of their conrtol over the political apparatus of the Communist Political Association—were able to transform that organization into the Communist Party'' (id., p. 498) and that defendants in *Dennis* had been responsible for ''the formation'' of the conspiracy and were ''the leaders'' who the evidence showed were empowered to make the ''call'' when defendants ''felt that the time had come for action'' (id., pp. 510-11). It was upon such findings, ''coupled with the inflammable nature of world conditions'' (p. 511), that this Court held ''we are in accord with the Court below, which affirmed the trial Court's finding that the requisite danger existed'' (p. 510). This Court did not hold in *Dennis* that every officer and member of the Party in the United States possesses the ''power to bring about the evil''.

There was no evidence in this case that these petitioners in California possessed any power to cause any attempted forcible overthrow of the Government nor does the record present any evidence that the nature of their activities indicated any such purpose.

The Court of Appeals opinion, in its discussion of the issue, states that we "attempt no comparison of the respective records" in *Dennis* and the case herein (Appendix A, p. 6). It states that "world conditions" have not changed (id.), that the "general type of proof" was the same (id.); that the jury was not required to find whether these petitioners "as a whole" or individually had the power to "bring about the destruction of the government" (id., p. 31). "—if the trial court had thought these actions and utterances were merely vaporings of ineffective folk, upon motions for acquittal, a verdict of acquittal could have been directed" (id., p. 31). The "power to bring about the evil", according to the Court of Appeals, meant in *Dennis* only "the setting" in which the defendants there acted so as to allow the Court to conclude "that the teachings might have resulted in an attempt at overthrow" (id., p. 5).

In the first place, it is not only the setting or world conditions which determine whether utterances constitute a clear danger. The "setting" must be coupled with evidence that the utterer had the ability to bring about the substantive evil which Congress had a right to prevent. In the second place, the trial Court neither considered nor submitted to the jury the question of "vaporings of ineffective folk". Even a "timid man", the trial judge said, who advocated the proscribed doctrine "on a re-

corder" in a "very mild" tone of voice, with unlawful intent, constituted a "clear and present danger" (R. 12442-3). Thus, the constitutional rights of petitioners were determined without considering essential evidence necessary in the determination of "clear and present danger". Cf., *Lauf v. E. G. Shiner & Co.*, 303 U.S. 323, 329-30.

In this case, the determination of the issues of the petitioners' "power to bring about the evil" and the "nature of their activities" depended upon an examination and evaluation of the evidence in the record, which the trial judge, with the approval of the Court of Appeals, refused to make. Even if the ruling of the Court of Appeals had been otherwise; it would have been impossible for the appellate court to evaluate the evidence including the credibility of the witness, as to each of the petitioners, in a record of over 14,000 pages. This was a function for the trial judge, and this function the trial judge refused to perform.

The rulings of the courts below on the issue herein are in conflict with the decision of this Court in *Dennis*. In *Dennis*, this Court held that the question of "clear and present danger" was for the trial judge, and not for the jury, as the defendants contended. The rulings of the courts below have taken the matter one step further and actually removed the issue from Smith Act prosecutions.

II.

THE INTERPRETATION BY THE COURTS BELOW OF THE WORD "ORGANIZE" AS CONTAINED IN THE SMITH ACT CONSTITUTES AN ERRONEOUS AND UNCONSTITUTIONAL CONSTRUCTION OF THE STATUTE AND PRESENTS A NEW AND IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

1. The issue is whether the word "organize" as contained in the Smith Act includes "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, group or other organization" (App. Item 2(g), pp. 36-8). As a general rule of statutory construction, words of a statute will be interpreted in their ordinary acceptation and significance and are to be given their natural, received, popular, approved and recognized meaning. *Rosenman v. United States,* 323 U.S. 658, 661. Ordinarily, the word "organize" means bringing an organization into being and endowing it with organs with which to function. Webster, *New International Dictionary* (2d ed.); Black's *Law Dictionary* (3rd ed., 1944). To organize is a very different thing from extending the limits of the organization or adding to or increasing its size. It has been so held in an unbroken line of decisions to which there does not appear to be any contrary legal precedent. *People v. Thurman,* 62 Cal. App. 147, 216 P. 394 (1923); *People v. Thornton,* 63 Cal. App. 724, 219 P. 1020 (1923); *People v. Ware,* 67 Cal. App. 81, 226 P. 956 (1924); *Warren v. Barber Asphalt Pav. Co.,* 115 Mo. 572, 22 S.W. 490, 491 (1893); *State ex rel. Childs v. School District,* 54 Minn. 213, 55 N.W. 1122 (1893); *Whitmire v. Cass,* 213 S.C. 230, 236, 49 S.E. 2d 1 (1948).

2. This Court has never had occasion to pass upon the issue here. The question did not arise in *Dennis* because the charge in the indictment there and the proof showed organization of the Party on July 26, 1945 and the indictment was returned on July 20, 1948, and no comparable instruction on "organize" was given by Judge Medina. *United States v. Foster,* 80 F. Supp. 479, 481 (D.C. 1948). The question appears neither to have been raised nor considered on appeal in *Frankfeld,* 198 F. 2d 679 (C.A. 4, 1952). In *Flynn,* 216 F. 2d 354 (C.A. 2, 1954), the construction of the statute was directly contrary to the construction here (id., p. 358), and that portion of the indictment which charged a conspiracy to organize was held barred by the statute of limitations.

3. The history of the Smith Act and its phraseology indicate that the word "organize" is used in the ordinary sense. There was no discussion in Congress during the pendency of the measure as to the meaning of the term. Apparently it was assumed that the meaning of the word "organize" was obvious and settled. When Congress used a term in any special sense in the Smith Act, a special definition was inserted in the Act. See the definition of "Government of the United States", 54 Stat. 670, Title I, Section 2(b).

In *Dennis,* Justice Jackson noted that the Smith Act "followed closely the terminology" of the "criminal syndicalism statutes" enacted during the first World War. 341 U.S. 494, 562, note 2. It appears plain that Congress used these state statutes as one of the models for the Smith Act. The language of the California Criminal Syndicalism Act and the Smith Act are strikingly identi-

cal. Cf., Deering's General Laws, Act 8428, Section 2(4) and 18 U.S.C. Section 2385, par. 3. There appears to be no authority contrary to the three California decisions interpreting the word "organize" as used in this type of statute. *People v. Thornton*, supra; *People v. Thurman*, supra; *People v. Ware*, supra. Those decisions held that a society organized as the "I.W.W." to advocate and teach the proscribed doctrine was completely "organized" and in existence at and prior to the return of the indictment, and that neither the circulation nor distribution of the literature of the I.W.W. nor recruitment of members constituted "organizing or assisting in organizing" under the law. Ordinarily, it will be presumed that a legislature which follows the wording of a statute from another legislative jurisdiction accepts the previous judicial interpretations of the language. Such a presumption of legislative intention is especially strong where the similarity in language is marked, where the character of the decisions in the jurisdiction from which the language was adopted is well established, and there is no evidence to indicate a contrary intention. *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, 304-8; *James v. Appel*, 192 U.S. 129, 135; *Joines v. Patterson*, 274 U.S. 544, 549.

4. The Smith Act is a criminal statute and must be strictly construed. Penal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used. *United States v. Resnick*, 299 U.S. 207, 209; *Fasulo v. United States*, 272 U.S. 620, 629. The construction of the Act by the courts below was neither "strict" nor "fair" nor "clear". The view of the Court

of Appeals that the organization of the Party, like that of an army, will not be completed until such time as it has reached a membership which is as large as the Party desires and when the Party will accept only replacements, not additions, to its ranks (Appendix A, pp. 17, 18) confuses the size of an organization with the question of when the organization comes into being endowed to function as an organization. An army is organized when it comes into being and begins to function as an army and the Communist Party is organized when it comes into being and is endowed to function as the Party, although in the case of the army it may only come into being when it has recruited its full complement. In the case of any society, group or assembly of persons, they at least are in being and endowed with organs to function, no matter what the program or policies of the association may be, when at a formal convention a constitution is adopted and officers and committees elected. The indictment here was returned December 21, 1951. Under the construction of the statute by the courts below, a jury could return a verdict of guilt under either the substantive "organizing" charge or the conspiracy charge if the evidence showed only that a decade or more after the formation of the Party with its alleged proscribed doctrine an accused recruited a member into the Party, or suggested that one club be merged with another.

5. Since the trial judge told the jury that the word "organize" includes certain activities but did not purport to give an all inclusive or limited definition, the jury was left free to speculate that almost any innocuous activity was "helping to organize, or to organize" the

proscribed society. Such an extended construction of the word "organize" would encompass "advocating and teaching" (18 U.S.C. Section 2385, par. 1): "printing and publishing" (id., par. 2); and "membership and affiliation" (id., par. 3), in complete disregard of the plain Congressional purpose to create separate offenses.

The construction adopted by the courts below renders the statute unconstitutional, first because, as construed, the statute provides no ascertainable standards of guilt (*Musser v. Utah*, 333 U.S. 95, 97; *United States v. Cardiff*, 344 U.S. 174, 176), and second, because the statute thus permits the penalizing of activities protected by the First Amendment (*Thornhill v. Alabama*, 310 U.S. 88).

A statute which punishes the organization of a society with proscribed doctrines itself raises serious questions affecting freedom of speech and assembly as this Court noted in *Dennis*. To make any lawful activity of members of the organization thereafter a criminal attribute of "organize" is to permit the statute to sweep within its ambit ideas and activities protected from governmental infringement by the Constitution. The most lawful speech of a Party member which resulted in the recruitment of a single person could result in criminal prosecution under the "organizing" statute. Cf., *Wieman v. Updegraff*, 344 U.S. 183.

6. If petitioners' view be accepted, concedely so much of the indictment as charged a conspiracy to organize was barred by the three-year statute of limitations. Judge Dimock in *Flynn* so instructed the jury: "The Communist Party was organized back in 1945 . . . Thus, even if you

should find beyond a reasonable doubt that a defendant, who had not conspired to teach, had conspired to organize a group to teach, you could not find him guilty because the act of organization of the Communist Party was, as we say prior to the period of the Statute of Limitations." *United States v. Flynn*, unreported (S.D.N.Y. 1953; C 137-7). The question of the guilt of an accused cannot be submitted to the jury when the cause of action is barred by the Statute of Limitations. *United States v. Irvine*, 98 U.S. 450. "Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one." *Fiswick v. United States*, 329 U.S. 211, 216. The conviction of petitioners, under the general verdict of the jury, may have rested upon that portion of the charge barred by the statute of limitations. Moreover, even if the charge of conspiracy to organize were not barred by the statute of limitations, the jury was permitted to return a verdict of guilty on the theory that recruiting or other activity in the Party was proof of participation in a conspiracy to organize as charged. The judgments of conviction must therefore be set aside if the construction of the statute by the courts below was erroneous. *Stromberg v. California*, 283 U.S. 359, 369-70; *Williams v. North Carolina*, 317 U.S. 287, 291.

III.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S VERDICT THAT EACH OF THE PETITIONERS HERE KNOWINGLY AND WILFULLY JOINED THE CONSPIRACY ALLEGED IN THE INDICTMENT WITH THE SPECIFIC INTENT TO OVERTHROW THE GOVERNMENT OF THE UNITED STATES BY FORCE AND VIOLENCE AS SPEEDILY AS CIRCUMSTANCES WOULD PERMIT. THE COURTS BELOW PERMITTED THE JURY TO RETURN VERDICTS OF GUILT UPON STANDARDS OF PROOF VIOLATIVE OF THE DUE PROCESS PROVISIONS OF THE CONSTITUTION AND IN DEROGATION OF THE FREEDOMS PROTECTED BY THE FIRST AMENDMENT.

1. This Court has "never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict". *Mortenson v United States,* 322 U.S. 369, 374. "Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner v. United States,* 322 U.S. 665, 671. See also, *Klapprott v. United States,* 335 U.S. 601, 612: *Hartzel v. United States,* 322 U.S. 680; *Schneiderman v. United States,* 320 U.S. 118. See, *Offutt v. United States,* 99 L. ed. Adv. 7, 10. This Court has stated that in cases affecting the fundamental liberties of an accused the proof must be "clear, unequivocal and convincing"; there must be "that solidity of proof which leaves no troubling doubt in deciding a question of such gravity" (*Baumgartner v. United States, supra,* p. 670, 671: see also, *Hartzel v. United States,* supra, p. 687).

This Court stated in the proceedings on bail in the case herein: "Even on a conspiracy charge defendants

do not lose their separateness or identity." *Stack v. Boyle,* 342 U.S. 1, 9. Guilt remains individual and personal, even as respects conspiracies. "It is not a matter of mass application." *Kotteakos v. United States,* 328 U. S. 750, 772. Especially is this true in a case where restrictions on First Amendment rights are largely dependent upon substantial proof of an individual unlawful state of mind.

Unless membership and officership in the Communist Party alone establish participation in the illegal conspiracy charged herein and the requisite specific intent, there is absolutely no basis for the conviction of these petitioners. A review of the evidence relating specifically to each of the petitioners will demonstrate the complete absence of any substantial evidence to support the judgments of conviction herein. Not only is there a failure to establish guilt by a "solidity of proof" or by "clear, convincing and unequivocal evidence", but in most instances there is not even a shred of evidence to support the essential ingredients of the offense charged against these petitioners. The following is a statement of the evidence as to each petitioner. We do not repeat the evidence against petitioner Steinberg set forth in the state of the case, except to assert that if participation in a lawful public meeting held under the auspices of the Communist Party is to be held sufficient to justify a conviction under 18 U.S.C. Sections 371 and 2385, as the Courts below held in effect, such wide breach in the Constitution should at least demand the scrutiny of this Court.

Dorothy Healey Connelly.

Petitioner Dorothy Healey Connelly is shown to have been connected with the Young Communist League as far back as 1933 (A 243).[10] The earliest evidence of her Party membership relates to 1945. The record shows that she held the following positions in the party: from 1945 until 1948 Organizational Secretary for Los Angeles County (Exs. 321, 298, 407, 415, 450-1, 640, 641, 643-5; A 124-5, 289-90, 305-6, 374-5); and in 1949 and 1951 Chairman for Los Angeles County (Ex. 642, A 291-2, 451).

She attended the National Convention in 1945 and upon her return spoke at the California State Convention where she advocated a "militant" future for the Party and re-education of all Marxists (R 44, 130-1).

The record is devoid of any evidence relating petitioner to the concept of forceful overthrow of the government or to Marxism-Leninism as embracing this concept.

It is impossible to rationally infer that an accused wilfully joined a conspiracy to advocate and teach the forcible overthrow of the Government with specific intent to forcibly overthrow the Government as speedily as circumstances permit because the accused advocated the "re-education of all Marxists" or a "militant" Party. It should be noted that the record is barren of any overt acts on the part of this petitioner to support any inference of wrongdoing or criminal intent.

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[10]The letter "A" refers to Appellee's Appendix in the Court of Appeals.

Rose Chernin Kusnitz.

This petitioner held the following offices in the Party: in 1943 Section Organizer, Bronx Section, Bronx, New York (A 317); during 1949 Section Organizer West Jefferson Section, Los Angeles County and Organizational Secretary of the Midtown Division, Los Angeles County (A 356).

In 1946 she attended a public Party meeting at the Embassy Auditorium at which petitioner Schneiderman made a speech in which he reportedly "urged that Marxist training be immediately adopted" and said "that free elections in this country can only serve the purposes of the fascists" (A 133-5).

There is no evidence at all connecting this petitioner in any fashion with advocacy of the violent overthrow of our government or the reading, use or interpretation of Marxist-Leninist works. Indeed, the record is so barren of any proof against this petitioner that even the "scintilla" rule of evidence would appear to be violated. Even the aforesaid statement which she allegedly heard in a public meeting, not shown to have been accepted or adopted by the petitioner, appears to be garbled in the light of the uncontradicted record showing support and use by the Communist Party and these petitioners of the democratic machinery of our government, including the electoral process (Exs. 546, 534, EK 7, App. Item 20 pp. 127-30; Exs. 516, 517, 199; App. Item 21 pp. 130-1; Exs. 579, 544, 542, 631-5 incl. 519, 578, 530; 555, 557, 538; App. Item 22, pp. 131-3).

Albert Jason Lima.

Petitioner Lima was a Party member in 1940 (Exs. 527-8, A 452). He held the following positions in the Party: In 1945 Field Organizer working out of the San Francisco office (A 12); in 1945 and 1947 member of the National Committee (Ex 650, Ex EA 598); in 1947 Assistant State Organizational Secretary and Secretary of the California organization (Exs. EA 561, 569; A 447); in 1948 "Field Organizer" (Ex. 315); and in 1950 Chairman of the East Bay Region, consisting of Contra Costa and Alameda Counties, California (A 109-11).

In 1947 he attended a meeting at which petitioner Schneiderman spoke, which meeting was attended by petitioner Yates.

There is no evidence relating this petitioner to Marxist-Leninist books. And there is none of any advocacy by him or agreement to advocate violent revolution.

Only a process of sheer guesswork and conjecture could support a finding of guilt on the part of this petitioner.

Loretta Starvus Stack.

Petitioner Stack was shown to be a member of the Party as far back as 1932. She has acted in the following official Party capacities: In 1945 California delegate to the National Convention (A 72-3); in 1945 member of the California State Committee (Ex. 398; A 124-5, 130); 1945 to 1949 California State Secretary or Organizational Secretary (Exs. 533, 562, 564, 566, 569, 570, 577, 582, A 446-52); in 1950 member of the California State Committee (A 418).

According to a prosecution witness at the 1945 State Convention "Loretta Starvus made a fiery speech accepting her election to the state board by stating that American workers will be the grave diggers of the capitalistic government, and she urged Marxist-Leninist rules, reinstitute them all over" (A 130). At a Party Convention in Los Angeles in 1946 she said that "we, speaking of the Communist Party, are the instrument through which . . . this capitalist form of government will be overthrown, and a socialist form set up" (A 29-30). The same year, at a county conference of the Party, she spoke of poor housing conditions as an example of what must be endured under capitalism, and said that this should "spur us into working for socialism in our time in the United States" (A 306). In none of these speeches was force or violence mentioned as the means to be used to achieve the desired objectives.

In 1948 she made a report to the State Convention of the Party in which she discussed the ability of the party to participate effectively in "building a people's coalition against war and fascism". In this connection she spoke of the reconstitution of the Party as "the vanguard of the working class", and of the "class struggle of the proletariat". To rebuild the Party, she said the "members who had joined during the revisionist period had to be won over to the Marxist principles of Party membership"; in order to achieve the Party's political objectives labor must become "the backbone of the new party and of the coalition" against war and fascism, requiring consistent emphasis upon building the Party among industrial workers (Ex. 186; A 580-1).

Also in 1948, at a Party meeting she "made reference to the historic role that the women played in bringing about the Russian revolution" and she said "that women of today . . . must take the same historic role . . . and the exoneration of the women would only be brought about through this revolution, the overthrowing of the present economic system, not in part but in its entirety" (A 117-19).

The only evidence in any way tying this petitioner into advocacy of force and violence goes back to 1934, sixteen years before the date of the indictment here. In 1934, according to the witness Leonard Patterson, she told him that she had been taught street fighting and the use of bayonets at the International Lenin School in Moscow; that it was the duty of students at the school to prepare the Party for "illegal work", but to attempt to "stay legal" as long as possible; that if the Party was driven underground it should remain "intact" and "function right along"; and that it was the students' duty "to work to overthrow their own governments and to set up the dictatorship of the proletariat as a guarantee that the Government that was overthrown would not regain its power" (A 213-20). The witness Patterson first became available to government agencies in 1947. He did not discuss the alleged conversation, of which he had kept no record, with anyone until January, 1952 (R. 5644, 5759, 5763).

There is nothing in the record showing that this petitioner supported the use of force and violence by advocacy, agreement to advocate or otherwise during the entire sixteen year period following this alleged conversation. Not

even the appearance of a case could have been made against this petitioner without the alleged conversation of 1934, seventeen years before the return of the indictment herein. The only other isolated statements petitioner allegedly made orally in this twenty year period (three in number) were rhetorical matters of prediction and prophecy devoid of advocacy of force or violence.

With respect to the 1934 conversation, it should be noted that the story was filtered through the self-deluding memory of a hostile, professional witness who had waited almost two decades to tell his tale (R. 5623-6, 5633-40, 4652, 5656, 5665, 5677-78, 5686-90). The witness' identification of petitioner was dubious (R. 5355-57, 5766-70). He was an active and professional informer admittedly earning more money than he had ever earned before, scurrying from one case to another identifying persons he hadn't seen for periods ranging back to fifteen years or more (R 5623-26). A recent editorial in the public press states: "It is reasonable to suppose that the professional, paid informers, such as those on the rolls of the Justice Department, who can be said to make their living at this game, feel the necessity of continuing to 'produce' if they are not to give up their lucrative occupation." New York Times, July 8, 1954. That evidence of a so-called uncorroborated and private oral conversation, allegedly occurring decades before the trial and emanating from a paid informer, is generally distrusted and considered palpably insufficient to support a conviction is the judgment of the law. Wigmore, *Evidence* (3d ed.), Vol. IV. Section 1056; Vol. VII, Section 2094. The principle finds its support in past history

(Chafee, *Freedom of Speech* (1920), pp. 357, 490; May, *Constitutional History of England*, II pp. 275-78), as well as in contemporaneous events. *United States v. Schneiderman*, 320 U.S. 118, 128; *United States v. Flynn*, 130 F. Supp. 412 (S.D.N.Y. 1955), opinion of Dimock, J. granting motion for new trial in part after the notorious Matusow revelations.[11]

Frank Efroim Spector.

In 1939 petitioner Spector was referred to in a Party publication as a "pioneer leader of the Communist Party in Los Angeles" (Ex. 611). He held the following offices in the Party: From 1936 until 1940 organizer, secretary or chairman for San Francisco and member of the County Committee (A 5-6, 12); 1950 Los Anegels County Southern Division Organizer (A 292-4).

In 1946 he conducted classes in Hollywood and assigned reading material from several Marxist-Leninist works (R 663-5); in 1947 petitioner criticized a suspected spy who had been Educational Director of a club for his having read only several Marxist-Leninist writings and told him that a person in a position of such responsibility ought to be very widely read in the basic works of Marxism-Leninism in order to interpret them to the club members (A 310-12); in 1949 it was announced that he would

[11] Although the issue of the credibility of paid government informers was crucial in the trial herein, the trial Court refused to specifically instruct the jury that the testimony of witnesses who entered the Communist Party at the request of the Federal Bureau of Investigation should be weighed with caution (App. Item 2(q), pp. 69, 80). See, *District of Columbia v. Clawans*, 300 U.S. 617, 630; *Fletcher v. United States*, 158 F. 2d 321, 322 (C.A.D.C., 1946).

act as instructor on the topic of "The State" at a Party County Section Leadership Training School (A 297).

There is evidence neither that petitioner ever construed Marxism-Leninism as calling for the violent overthrow of our government nor that he has ever advocated or been connected in any way with advocacy of violent revolution.

The fact that petitioner suggested or recommended the reading of Marxist literature could not justify an inference that petitioner intended to join the conspiracy alleged in the indictment with the specific objective of forcibly overthrowing the Government as speedily as circumstances permit. The Marxist writings introduced into evidence by the prosecution were in many instances identical with, and in the others in substance the same as, those introduced in *Schneiderman v. United States*, 320 U.S. 118.

Many of the prosecution as well as the defense exhibits contained language inconsistent with the prosecution's theory of guilt from adherence to Marxism-Leninism. For example, the Constitution of the Party specifically opposes advocacy of force and calls for the establishment of Socialism "by the free choice of the majority of the American people" (Ex. 21; App. Item 14, pp. 114-16).[12] Many official utterances of the Communist Party advocated the use of democratic channels to educate the people as to the necessity for Socialism with the per-

[12]Unlike the *Dennis* record, there was no testimony here of an understanding by the petitioners that this language or any other Party publications did not mean what it said. 183 F.2d 201, 229, 232.

spective of winning the great majority to support and achieve that aim (Ex. 55; App. Item 15, pp. 116-117; Exs. BC 83, 150, EU; App. Item 16, pp. 117-118; Exs. 626, 201). Advocacy of force and violence was explicitly denied (R. 1161, Ex. FG 5121-25; Ex. KI, R. 10623).

Much of the evidence relied upon by the prosecution consisted of third party declarations outside of the presence and without the knowledge of any petitioner. In connection therewith it was shown that differing views were constantly expressed within the Party and that arguments concerning the meaning and interpretation of Marxism-Leninism were frequent (App. Item 39, pp. 175-176; App. Item 40, pp. 176-7), including disagreements with the views of the Party leaders and of the National Chairman of the Party (App. Item 40, pp. 176-7; App. Item 40, pp. 177-80).

In the light of the aforesaid uncontradicted record, it can hardly be claimed that a recommendation to read Marxist-Leninist literature was equivalent to the advocacy of the forcible overthrow of the Government of the United States. Yet this is precisely what the jury was permitted to infer.

Oleta O'Connor Yates.

Petitioner Yates joined the Party in 1933 (R. 10250). She held the following positions in the Party: In 1936 Organizer of San Francisco County, member of the District Committee of District 13 and a delegate to the National Convention (A. 6-8; Exs. 522-5, 584, 631-4); until 1944 various positions in the San Francisco County organization and in 1944 the County Chairman (A. 7-8,

378; Exs. 563, 565); from 1950 until the time of trial, California State Organizational Secretary with the duties of helping organize recruiting to build the Party, of organizing mass campaigns and of checking on dues payments (A. 393-4).

She used certain Marxist-Leninist works in lecturing at a Party school in 1936 and 1937 (A. 8-9, 248-9); she taught a Marxist class in 1945 (A 369); in 1946 she contributed an article entitled "The Struggle Against Deviations and Factionalism in San Francisco" to the Party publication "Political Affairs" (Ex. 639, A 157-9, 597); and in 1949 with assistance of petitioner Schneiderman she prepared a "Study Outline" for a Marxist Institute (Ex. 163, A 397). Despite the fact that prosecution witnesses were present at the classes on Marxism taught by petitioner Yates, there is not a word of testimony in the entire record indicating that she ever construed Marxism-Leninism as calling for the violent overthrow of the government of the United States. In her 1946 Political Affairs Article she supported a program for peace, coalition with progressive forces and participation in election campaigns; she opposed a policy calling for strikes regardless of whether they can be won (App. 334-43, Item 83). The outline prepared in 1949 stated:

> "3. Attitude of American Communist Party on force and violence defined in Constitution—advocates of force, violence or terrorism barred from membership."

Petitioner testified at length concerning her own adherence to and understanding of Marxism-Leninism.

She became interested in Marxism-Leninism in the early '30's during the depression. She was seeking and found in Marxism-Leninism what appeared to her to be explanations for the economic problems of the times (App. Item 84, p. 343).

As a result of her interest in Marxism-Leninism she joined the Socialist Party (R. 10198-9). She became dissatisfied with the Socialist Party because its program did not call for any activity around the immediate issues confronting the American people (App. Item 85, p. 844). During this period she began to learn about the Communist Party and became interested in it because of its program calling for such activities under our existing Government on the day to day problems of the people, including such matters as unemployment, housing, relief, etc. (App. Item 86, p. 345).

She left the Socialist Party and joined the Communist Party because of these views and because she believed that the Communist Party was educating the people to understand "the need ultimately of moving toward a socialist society" (App. Item 87, p. 347). Her state of mind from the time of joining the Communist Party up to and including the time of her testifying was that she was acting lawfully in exercising her "responsibility" to bring forward those things that "I believe would serve the cause of the people and the country and that the people would determine for themselves what they accepted" (App. Item 88, pp. 347-8).

It is her understanding that the general principles set forth in Marxist-Leninist writings must be *considered in the light of the historical conditions* under and with

respect to which they were written and must be *"applied in the light of different circumstances today"* (App. Item 89, pp. 348-9).

It is her understanding that the principles of Marxism-Leninism correctly applied and as applied by the Communist Party after the threat of fascism appeared on the world's scene required opposition to fascism and called for a people's movement to prevent it and to defend democracy; that the defense of democracy and opposition to fascism would ultimately open up new ways for the majority when they wanted it to achieve socialism peacefully (App. Item 54, pp. 223-4); that the greater the democracy the greater the possibilities of bringing about social changes in a peaceful manner; that if our democracy is continued and expanded there is no need for fearing strife or violence in the effecting of social change. In her own life she has done everything possible to strengthen the democratic processes (App. Item 90, p. 349).

According to her understanding of the correct application of the principles of Marxism-Leninism and of the Communist Party, socialism is not and has never been an immediate issue in the United States. It can become an immediate issue only when the majority of the people want it (App. Item 91, p. 350); the Communist Party must win the adherence of the majority of the people and only through their free will can or should socialism be established (App. Item 92, p. 351). She can conceive of no situation in which she should advocate the forceful overthrow of the present Government of the United States (App. Item 94, p. 358).

The record reveals, during petitioner's entire seventeen years of Party membership, not a single utterance written or spoken of advocacy or indicating adherence to the doctrine of violence. It does indicate her attendance at three meetings at which others are reported to have made statements which respondents contended constituted advocacy of force and violence.

In 1945 during the United Nations Conference, she attended a reception for Mother Bloor, then 83 years of age. The reception was held on printed invitation at the home of a non-Communist and present were Communists and non-Communists, including casual drop-ins. Photographs were taken of all present at the reception. At this meeting, according to the witness Daisy Van Doren[13], Mother Bloor said that she was happy to be in San Francisco "on the eve of our great rebellion", "that we are prepared to the point that we have arms awaiting for us", that "it is going to be a wonderful revolution", that "I am 83 years old and I will live to see this bloody battle through", and "there will be blood flowing in the streets" (A 369-72). At the same time, according to this witness Mother Bloor called on the assemblage to be good Red Bolsheviks and to be "slick, sly and smooth ... Don't be rough. You won't win people over that way". According to the same witness, Mother Bloor also praised the wonderful gathering of peace-loving nations to the United Nations as a "basis for a lasting peace", she mourned Roosevelt's death and stated that while "we don't know about Truman, that we are going to give

[13]She was so discredited that the prosecution did not even refer to her hair raising testimony in closing argument.

him a trial" (R. 8002-4). Petitioner Yates testified that the reception took place but that there was no talk of revolution or violence (R. 10841-9).

In 1946 she attended a club meeting at which some "leftist" Party members were on trial. Petitioner Fox, in answering claims of the accused that the Party was not "revolutionary" said that "it was a revolutionary party, that he wanted to see the overthrow of this lousy system just as much as any one else present, but there was a time and place for militant action and it had not arrived yet" (A 148-50).[14]

In 1947 she attended a meeting, at which petitioner Schneiderman said that the goal of the Party was the establishment of socialism, that the masters of finance capital would never give in without a fight and that socialism would only be brought about by a violent revolution (A 146-7). The witness who testified to this incident stated that what he had been taught in the Party on this subject was that violence would take place because when the majority of the American people would exercise their free choice to establish socialism, the minority would not permit the majority to effect such a change peacefully (R. 4902-3, 4912-13).

With respect to none of the last three mentioned meetings is there any evidence that petitioner Yates said or did anything at all.

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[14]The respondent has contended that the word revolution necessarily connotes force and violence, despite the uncontradicted evidence (Ex. 626, R. 1785) and the trial Court's instructions (Inst. 14-J, App. Item 2(m), p. 56) to the contrary.

Not only is the case against petitioner Yates devoid of any proof of an unlawful intent as alleged in the indictment, but the affirmative testimony of petitioner's lawful state of mind is unrefuted on this record. The prosecution relied on three unrelated meetings (during a period of almost twenty years) which petitioner allegedly attended, but where she said nothing. At none of these meetings were the equivocal statements of the speakers properly imputable to petitioner or capable of establishing petitioner's specific intent as alleged in the indictment.

Petitioner's understanding of Marxism-Leninism was entirely lawful, and even supported by the prosecution's own evidence. The exhibits relied on by the prosecution, written with respect to time, places and conditions far different from those prevailing with respect to the activities of petitioner, stated that the conclusions there contained could not be mechanically applied to different places and circumstances (App. Item 48, pp. 206-7; Ex. 28; App. Item 49, pp. 207-8; Ex. 147; Ex. 39, R. 2618).

Repeatedly the writings say that "every nation will effect its transition to Socialism not by a mapped-out route, not exactly as in the Soviet Union but by its own road, dependent on its historical, national social and cultural circumstances" (Ex. B B R. 2667-68).

Prosecution witnesses conceded that when they were members of the Communist Party they understood that methods used in Russia were not applicable to the United States, they believed in the establishment of socialism in this country by the free will of the majority and they had been taught that violence was not part of the Party Program or Marxism-Leninism as applied to a democratic

government like that of the United States (App. Item 17, pp. 118-122; App. Item 18, pp. 123-125). All of the aforesaid were petitioner's beliefs, unrefuted on this record, and the charge against this petitioner was for these reasons not sustained.

Carl Rude Lambert

Petitioner Lambert was a member of the Party and responsible for security in 1935 (A 249-50). He has held the following positions in the Party: in 1936 member of the Party Control Commission (A 12); in 1939 and 1942 Financial Secretary of District 13 (Exs. 572-574; A 446); in 1944 Administrative Secretary for San Francisco (Ex. 563; A 448); in 1946 head of the Security Committee in California (A 150-3, 235); in 1949 State Financial Secretary and Chairman of the State Security Board (Exs. 564, 582; A 447-50, 327).

In 1945 he attended the "Mother Bloor" meeting discussed supra p. 61) (A 369-72). In 1946 he was present at the club meeting at which petitioner Fox spoke, discussed supra (A. 148-50). In 1947 he was present at the meeting discussed supra at which petitioner Schneiderman is reported to have said that the change to socialism would involve violence because the "masters of finance capital" would not permit the majority to achieve such a change peacefully (A 145-7).

In 1948 he attended a functionaries meeting at which petitioner Dobbs referred to a chapter of the History of the Communist Party of the Soviet Union (Ex. 28) dealing with the Russian newspaper Pravda and said that the People's World had a similar role to that of Pravda and

had to be maintained for the purpose of disseminating information and instruction (A 186-92). In 1950 he was present at a club meeting in Chico, California at which one Sutherland, an FBI plant in the Party, was expelled on charges of chauvinism, an attempt to cheat a Negro worker out of his property and carrying a gun while distributing Party leaflets. Sutherland testified that petitioner said that Sutherland's expulsion was recommended by the State Board because they were purging the Party for "emergency or revolution"; that one Alexander said that the European crisis may decide when a revolution can be expected; that petitioner then said that in the light of possible world developments "anything can be expected"; that Sutherland then said: "Are you really planning revolution by bullets instead of ballots" and Alexander replied to Sutherland who was being expelled: "Just what the hell do you think we are purging the party for?" (A 327-9, R. 7664-8).

There is no evidence that petitioner interpreted Marxist-Leninist writings as calling for the forceful overthrow of the United States government and there is none that in his entire Party membership he ever advocated violent revolution.

Indeed the record is virtually barren of anything the petitioner himself said or did while a member or officer of the Party. The concern of petitioner with spies and provocateurs in the Party was not proven to be for any unlawful purpose, and in fact the undisputed record demonstrates that the concern was to protect the Party membership from illegal attacks, both from private as well as official lawlessness (R. 5896-5930, 5953-65). The

attempt to impute to petitioner the conversation between an informer and a third person was fruitless. There was no evidence on the record that petitioner by his overt conduct, directly or indirectly, adopted the view of the third party, even if such view was ever expressed. The inherent incredibility of the story concerning "revolution by bullets instead of ballots" was manifest. The government informer who testified to the conversation with the third party was at the very time being expelled by the Party for carrying a gun. Without this incident, the case against petitioner was patently empty.

Ernest Otto Fox

The evidence shows that petitioner Fox has held the following offices in the Party: in 1935 Organizer in Seattle, Washington (A 10); 1947 and 1948 Chairman of a Party Club (A 283); in 1948 and 1949 Chairman of the Haskell Section of the Party in San Francisco (A 288); in 1949 Organizer of the Waterfront Section in San Francisco (A 288); and in 1951 Maritime Section Organizer in San Francisco (Ex. 177; A 579).

In 1946 at a Party meeting at which "leftists" were on trial petitioner said that the Party "was a revolutionary party, that he wanted to see the overthrow of this lousy system just as much as anyone else present, but that there was a time and place for militant action and it had not arrived yet" (A 148-50).

In 1948 he maintained a complete set of the Little Lenin Library in his home (A 289). There is no evidence as to his reading, use or interpretation of these or any other Marxist-Leninist works.

The charge here was not the advocacy and teaching of the overthrow of the *capitalist system.* There was no discussion of the use of force and violence or unlawful methods to achieve the substitution of one economic system for another. The words "revolution" or "overthrow" do not mean the use of force and violence (see, App. Item 2m, p. 56); they connote the result of social changes; not the method of obtaining them. Clearly, a single incident such as the one here involved emanating from the mouth of a hostile and biased witness (R. 4717-21) was not "clear, convincing and unequivocal" proof of every essential ingredient of the offense charged against this petitioner.

Ben Dobbs

This petitioner was a member of the Young Communist League from 1932 to 1945 and its San Francisco Director in 1935 (A 11, 243). The record indicates that he has held the following offices in the Party: in 1936 member of the California State Committee (Ex. 549; A 458); from 1946 to 1949 Los Angeles County Labor Chairman, Labor Director, Trade Union Director or Labor Secretary (A 137; Ex. 407; A 289-90; Ex. FO. p. 3; Exs. 737, 159B; A 208-11); in 1950 Los Angeles County Organizational Secretary (A 292-4); and in 1951 an officer (title not given) in Los Angeles County (Ex. 642, A 451).

In 1948 at a Party Press School, petitioner gave a lecture, with assigned reading of several pages of History of the Communist Party of the Soviet Union (Ex. 28), in which he "described the role that Pravda had played in the assisting of the Revolutionary movement in Russia" and of its continued circulation when it was out-

lawed; he urged that "we see to it that we had organizations set up to provide as Pravda had done for the distribution of literature from hand to hand, if necessary, or in any other method that we were able to do in the event that Communist publications themselves were no longer allowed in this country"; he stated that if the Party was not outlawed, it was necessary to build the press to get at least widespread "reading, if not acceptance, by those people to whom we are able to distribute it". He made no statement that the press and literature should be used to advocate the forceful overthrow of our government (A 193-6).

In 1948 at a functionaries meeting he again referred to the portion of the "History" (Ex. 28) dealing with Pravda, made a comparison of its role with that of the People's World[15] and said that it should be maintained for the purpose of disseminating information and instructions (A 186-92).

Petitioner was the main speaker at the Lenin Memorial meeting of January 21, 1949, which served primarily as a protest against the trial in New York of the national leaders of the Party, and which was charged as an overt act. The record is silent as to the contents of petitioner's speech (A 208-11).

As the above recital indicates, there is not the slightest evidence in the record that petitioner Dobbs ever advocated or taught, directly or indirectly, the forcible overthrow of the Government. The few statements he made while a member and officer of the Party were so obvi-

[15]Numerous copies of *The People's World* are in evidence. In none is there anything resembling advocacy of violent revolution.

ously the expression of lawful views, that it cannot be rationally inferred therefrom that petitioner intended to commit the offense charged in the indictment. Concern that the Party and its publications might be outlawed cannot be equated with advocacy and teaching of the forcible overthrow of the Government. A prosecution witness himself testified that the so-called "underground" was viewed by the Party as a means to "fight its way back into legality" in the event of outlawry (R 5901-28, Exs. FX, GC, GA; App. Item 76, pp. 290-3; R 1332, 4471).

Frank Carlson

The evidence indicates that petitioner Carlson became a member of the Party in 1932 or 1933 (R 7421; Ex. FF; R 4918; Ex. 730). In 1935 he was California State Director and in 1937 a member of the State Committee of the Young Communist League (A 11, 246). The record indicates that he held the following offices in the Party: in 1947 organizer and State Secretary in Wisconsin (Ex. 729, A 276, 280, 365); in 1949 Los Angeles County Organizer (A 84).

In 1936 petitioner led a study group which used Lenin's works, at which he said that something new had happened in the world, that "we must look to Lenin for the answers" and called for a program of putting an "American front to the Young Communist League" and winning young people for the fight against fascism (A 244-5).

In 1946 he taught classes in Marxism (A 358-65) and in 1949 he visited a session of a Marxist Institute (A 84). At no time is he reported to have construed Marxism-Leninism as advocating violent revolution in the United States.

Sometime after the end of World War II petitioner wrote, and the Party distributed, a pamphlet entitled "Let's Get Off the Dime". The pamphlet urged a strong defense of the living standards of the people, increased unemployment insurance, fair employment legislation and international collaboration for a peaceful world. Petitioner contended that by maintaining their trade unions strong, clean and democratic and by participating actively in the political life of their communities, the working people could most effectively protect their interests. As for socialism, appellant stated that was his goal and that of the Party (R 11967-69) but specifically declared that the goal would be realized only "when the decisive section of the American people line up with us" (Ex. MF R. 4916, A 938-69).

According to one witness, petitioner had a conversation with him in 1947 in which he referred to a situation in which Negroes resisted with arms an armed attempt at lynching; and when the witness purportedly asked petitioner how the Negro people got the guns, the reply was "Well, the Party has methods of doing so"; the petitioner then urged the witness to form an organization, the United Negro and Allied Veterans, stating that in the event of "a revolution in this country to overthrow this country by the Communist Party, that the Negro boys (sic) in the North will have to be militant enough to guide the Negro people in the South", and that Negro people should become more militant because capitalism is the cause of chauvinism; and he urged the witness to buy certain Marxist-Leninist books (R 6480-1). The witness' contemporaneous written report to the FBI,

Exh. 730, differed substantially from his testimony and quoted appellant in this reference as saying "Negroes in the South will have to be taught the communist way of living (program which is now being carried on by the Communist Party, the C.I.O. and the *American Federation of Labor*) before they can receive fire arms in the event of *revolutionary action by the fascists* in that part of the country". In explaining his report the witness said that he considered resistance to a Fascist revolution similar to overthrow of the Government of the United States (R 7446-9; emphasis supplied).

As the record indicates, in his daily activities as a member and officer of the Party, and in his writings, petitioner urged the use of peaceable and democratic methods for achieving both immediate reforms and future basic social changes. The only attempt to impute to petitioner the use of language of force and violence proved to be an expression by petitioner of resistance to "revolutionary action by the fascists", evidence which quite refutes the notion of an intention to forcibly overthrow the Government of the United States. The record in fact is indisputable that this petitioner by his overt daily conduct and writings believed only in peaceful methods of obtaining change and that his intent was entirely lawful.

The Communist Party, the record establishes, campaigned and conducted activities around such issues as discrimination, peace, social security, labor's rights, taxation, civil liberties, etc. (Ex. H.; App. Item 22, pp. 132-7; Ex. DX; App. Item 25, pp. 138-42; Ex. 359; App. Item 26, pp. 142-4; Ex. FM; R 5260; Ex. MN; R 11834, Ex. EA, R 4350; Ex. AQ, R 1885; App. Item 22, pp. 131-2).

The record as to this petitioner and others establishes no more than participation in activities of this character together with membership and the holding of office in that party.

3. While the Court of Appeals opinion employs general conclusions to support its view that the jury was justified in returning a verdict of guilt as to each of the petitioners (Appendix A, pp. 34-6), it must be noted that there is no attempt to support these conclusions by evidence from the record. "It is unnecessary to set out tabulations of the facts here" (id. p. 35, note 14). In actuality, the Court of Appeals states that many of the petitioners sought and obtained office as "organizers" in the Party (id. p. 34). It follows, states the Court, that "the jury might well have inferred from this participation a carrying into the field of action a phase of an illegal agreement", and the jury could have concluded that acceptance of such an office "evinced a participation in the unlawful agreement" (id. pp. 34-5). It is, therefore, from membership and officership in the Party that the courts below drew their catenate inferences, without any support in the evidence to justify the ultimate conclusions which led to the submission of the case to the jury.

However the "inference upon inference" rule may be abstractly criticized, it is a reflection of the underlying distrust of inferences which rest upon too many intervening inferences, and this Court has invoked the rationale of the rule in particular cases. *United States v. Ross*, 92 U.S. 281; *Manning v. Insurance Co.*, 100 U.S. 693, 698; *Looney v. Metropolitan R. R. Co.*, 200 U.S. 480, 488; *C. M.*

& St. P. Ry. Co. v. Coogan, 271 U.S. 472, 478; *Shepard v. United States*, 290 U.S. 96, 100. Here the evidence establishes no more than the connection of the petitioners with concededly lawful objectives and activities of the Party. There is not only an absence of speech or conduct by petitioners directly tending to prove the specific criminal intent, but there is no circumstantial evidence from which an inference of evil purpose can reasonably be drawn. Moreover, as has been indicated, there is strong circumstantial evidence from respondent's witnesses and exhibits logically pointing to the absence of such intent. Every link in the chain of inferences and presumed conclusions which the courts below permitted the jury to draw were the result only of arbitrary and prejudiced conjecture and surmisal. The barometer of guilt was made dependent in reality upon alleged long time membership and officership in the Party accompanied by lawful activities. The jury was permitted to guess that at some point each of the petitioners "must have come to know" that the Party, in basing itself upon the principles of Marxism-Leninism, actually was advocating the forcible overthrow of the Government, and with such inferred knowledge, each of the petitioners wilfully entered into the conspiracy alleged in the indictment, from which in turn it could be inferred that each petitioner had the specific intent to overthrow the Government by force and violence as speedily as circumstances would permit. There was here no "clear, convincing and unequivocal proof"; no "solidity of evidence" which left the issue free from doubt; no such relevant evidence as a reasonable mind might accept as adequate to support the conclusion that

the individual petitioners had committed the serious offense charged in this indictment with the requisite criminal intent. *Baumgartner v. United States*, 322 U.S. 665, 671; *Hartzel v. United States*, 322 U.S. 680; *N.L.R.B. v. Col. En. & St. Co.*, 306 U.S. 292, 299.

4. The essential elements of the offense could not, consistent with the Constitution, be established by mere proof of association in the Party. *Wieman v. Updegraff*, 344 U.S. 183, 191; *Schneiderman v. United States*, 320 U.S. 118, 136; *Kotteakos v. United States*, 328 U.S. 750, 772-3; *Von Moltke v. Gillies*, 332 U.S. 708, 727; *Stack v. Boyle*, 342 U.S. 1, 5, 9. Moreover, as the court below recognized (Appendix A, p. 10), since the decision of this Court in *Dennis*, Section 4(f) of the Internal Security Act (64 Stat. 991, 50 U.S.C. 783 f) has become applicable to all prosecutions under the Smith Act and neither the holding of office nor membership in the Party constitutes per se a violation of any criminal statute. In the view of the courts below, the statute enacted by Congress must be construed as preventing convictions upon mere proof of membership or officership in the Party, but a jury may justifiably infer guilt if the proof shows membership *and* "activities" in the Party, even if none of the activities were in any way unlawful (Appendix A, pp. 34-5), and were indeed constitutionally protected. Such a construction is contrary to the history and plain purpose of the statute. S. Rep. No. 1358 (to accompany S. 2311), 81st Cong., 2d Sess.; S. Rep. No. 2369 (to accompany S. 4037), 81st Cong. 2d Sess.; H. Rep. 3112 (Conf. Rep.), 81st Cong., 2d Sess.; 96 Cong. Rec. 13739, 13761, 14491, 14500. ("Section 4, requires

individually incriminating evidence of active participation in the activities prohibited" (S. Rep. No. 1358, supra, pp. 19, 20).

The drawing of inference of guilt from lawful association and lawful speech and conduct runs counter to the basic provisions of the First Amendment. That Amendment was intended to abolish the common law crimes of seditious libel and constructive treason, with its criteria of "bad tendency". Chafee, *Free Speech in the United States* (1920), pp. 20, 201. Proof of an unlawful intent such as the one here involved can no longer be established by reliance upon some isolated utterance which does not call for the accomplishment of any forbidden act, but which in the opinion of a Court or jury may appear to be rank error, exaggeration, vilification or even false statement. "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relationship of the speakers, but whether their utterances transcend the bounds of freedom of speech which the Constitution protects." *DeJonge v. Oregon,* 299 U.S. 353, 365. See also *Herndon v. Lowry,* 301 U.S. 242; *Cantwell v. Connecticut,* 310 U.S. 296; *Taylor v. Mississippi,* 319 U.S. 583; *Keegan v. United States,* 325 U.S. 478; *Burstyn, Inc. v. Wilson,* 343 U.S. 495; and *Baumgartner, Hartzel, Schneiderman and Klapprott, supra.*

The rulings of the Courts below run counter to historical and legal precedent. They do violence to the basic postulates enunciated by this Court in *Dennis* as demanded by the Constitution. It is submitted that review

here is urgently necessary if fundamental rights upon which the security of the nation depends are to be maintained.

IV.

THE CONSTRUCTION OF THE CONSPIRACY STATUTE BY THE COURTS BELOW WITH RESPECT TO "OVERT ACTS" WHICH PERMITTED THE JURY TO DRAW INFERENCES OF AN INTENT TO FURTHER THE OBJECTS OF THE ALLEGED CONSPIRACY FROM MERE SPEECH AND ASSEMBLY WAS ERRONEOUS AND VIOLATED THE PROVISIONS OF THE FIRST AMENDMENT.

This is the first occasion that this Court has been called to pass upon the construction of the "overt acts" provision of the general conspiracy statute (18 U.S.C., Section 371) as applied to Smith Act prosecutions. Since the courts below in effect treated the prosecution of the indictment here as a "standard conspiracy" without "any element of speech", the normal day to day activities of the petitioners in the Party, concededly lawful, were turned into "overt acts" and made to serve as proof of guilt. This presents an issue which should not be left unresolved by this Court.

Of the 23 overt acts alleged in the indictment, although none were withdrawn from the jury's consideration (Cf., *Cramer v. United States*, 325 U.S. 1, 36, note 45), there was evidence introduced relating to only two (13 and 16). These were two "Lenin Memorial Meetings", one in 1949 and the other in 1950. We have heretofore discussed the entire evidence involving the 1949 public meeting. The 1950 meeting was also public, attended by about 1600 persons, at which a petitioner, Schneiderman, was

heard to say that this was a "Lenin Memorial meeting", and "mentioned Mr. Truman" in his speech (R. 8063). A later announcement in the press stated that the petitioner spoke on the "China situation", that he stated that it was the "key issue for 1950", and that the people demand to know the stand of their representatives on recognition of China (R. 8065-66). That is the entire evidence on the meeting.

Even in a "standard" conspiracy, an inference of an intent to effect the alleged unlawful objectives thereof cannot be drawn from the mere performance of a non-culpable act, absent evidence that the "act" was intentionally in causal connection with the unlawful object of the conspiracy. *United States v. Hirsch,* 100 U.S. 33, 34; *Lonabaugh v. United States,* 179 Fed. 476, 481 (C.A. 8, 1910); *Tillinghast v. Richards,* 225 Fed. 226 229-33 (D.C. R.I., 1915). If this were not so, all would be swept within the conspiracy dragnet who associated in any way with alleged unlawful conspirators.

There was not the slightest evidence, with respect to either "overt act", of any advocacy or teaching of the overthrow of the Government of the United States by force and violence. The purposes of the meetings were conceded lawful. Yet, it is asserted by the court below that the jury could properly find beyond a reasonable doubt that the aforesaid petitioners, by their mere appearance at these meetings, carried the "illegal design into the field of action" (Appendix A, p. 28). The effect of the rulings of the courts below is to make any meeting under the auspices of the Party, or any utterances of a Communist on any subject an overt act in the conspir-

acy charged. It must also be recalled that "the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists." (Jackson, J. as Circuit Justice in *Williamson v. United States,* 194 F. 2d 280, 284 (C.A. 2, 1950).

Nothing in *Dennis* indicated that this Court had repudiated the fundamental constitutional principles enunciated in *Stromberg v. California,* 283 U.S. 359; *Herndon v. Lowry,* 301 U.S. 242, and *DeJonge v. Oregon,* 299 U.S. 353. Indeed, the vitality of those decisions was reaffirmed after *Dennis* in *J. Burstyn, Inc. v. Wilson,* 343 U.S. 495, 500, note 8. Those cases distinctly held that an inference of guilty conduct cannot be drawn from lawful participation in the activities of the Communist Party. This Court stated that the right of an accused to enjoy his personal right of free speech and to take part in a peaceable assembly having a lawful purpose was "the essence of his guaranteed personal liberty". *DeJonge v. Oregon,* supra, p. 366. The courts below have held to the contrary. Such a serious conflict should be resolved by this Court, for as Justice Jackson observed in *Williamson,* if inferences of guilt can be drawn from "overt acts" similar to the ones here involved, "it can equally well be drawn from many other opposition speeches by non-communists" (p. 283).

V.

THE REFUSAL OF THE TRIAL JUDGE TO GRANT PETITIONERS' MOTIONS FOR MISTRIAL BASED ON PUBLICATION OF THE "LONG SECRET F.B.I. REPORT" ON THE EVE OF SUBMISSION OF THE CASE TO THE JURY AND FOR A CONTINUANCE OF THE TRIAL AT ITS COMMENCEMENT BECAUSE OF PUBLICATION OF "THE PHILBRICK STORY" DEPRIVED PETITIONERS OF A FAIR AND IMPARTIAL TRIAL WITHOUT DUE PROCESS OF LAW.

1. This Court recently stated in *Remmer v. United States,* 347 U.S. 227, that any private communication in a criminal case "directly or indirectly", with a juror about the matter pending before the jury is deemed presumptively prejudicial (p. 229). As the Statement of The Case herein makes clear, the communication of the "F.B.I. Report" to the jurors could hardly have been more direct than if a copy of the Report had been mailed to each of them during their deliberation. The Report was knowingly and intentionally delivered for public consumption by a nationally prominent figure highly placed in the Department of Justice, the prosecutor of the indictment herein. The Report purported to determine the very issues which the jury was about to consider, and the shrieking headlines were as damaging, if not more so, than the Report itself. The trial judge constantly admitted evidence offered by the respondent to establish "the nature and character and aims and objectives of the Communist Party" (106 F. Supp. 892, 900, 906, 937; App. Item 2 (K), pp. 47-48). It was argued by respondent that the evidence showed that "the principles of Marxism-Leninism" were equivalent to advocacy and teaching of the forcible overthrow of the

Government. Under respondent's "inference upon inference" theory, these issues became fundamental in the case and were hotly contested by petitioners. It was a direct interference with the administration of justice for the prosecutor, or its agents, to publicly advise the jury on the eve of their deliberations, and after arguments of counsel, that the Director of the Federal Bureau of Investigation had a "highly confidential" and "long secret" report that the Party "teaches and advocates the overthrow and destruction of the United States Government by force and violence" and that the Communists "try by means of cunningly phrased arguments and allegations to disavow their advocacy of overthrow of Government by force and violence". Such a communication from the prosecution "tipped the scales" and made a fair decision impossible. *Remmer v. United States,* 347 U.S. 277; *Berger v. United States,* 295 U.S. 78, 88; *Shepherd v. Florida,* 341 U.S. 50, 51; *Delaney v. United States,* 199 F. 2d 107 (C.A. 1, 1952); Note, *Controlling Press and Radio Influence in Trials,* 63 Harv. L. Rev. 840 (1950).

It is doubtful that any instructions under the circumstances could have saved the situation. See, *Boyer v. United States,* 132 F. 2d 12, 13 (App. D.C., 1942); *Kirsch v. United States,* 174 F. 2d 595, 601 (C.A. 8, 1949); *United States v. Manne,* 84 F. Supp. 785 (D.C. Del., 1949). The trial judge insisted upon putting only one compound question to the jury, which was meaningless, insisting that the answer of the juror would have to be accepted without further explanation. The judge refused to give a special instruction on the matter (App. Item 2(q), pp. 69-70), and

enjoined any inquiry after the verdict. 106 F. Supp. 906, 925.

The Court of Appeals states: "With the trial court, we believe, to say the least, the incidents were extremely regrettable in the public interest" (Appendix A, p. 39). However, the Court of Appeals holds that the trial court was justified in deciding "to trust the jury" (id., p. 38) and that it is anomalous for petitioners to claim any constitutional rights while denying them to public officials (id., p. 39). In *Remmer, Berger,* and *Delaney,* the trial courts decided "to trust the jury", but this Court and the Court of Appeals reversed. Petitioners had the right to a fair and impartial trial, to the appearance of justice as well as justice itself. Improvident communications may improperly influence the most honest and rational exercise of judgment. *United States v. Shaughnessy,* 347 U.S. 260. Moreover, if the prosecutor, purportedly acting pursuant to his conception of the public interest and his right to publicly express his views, chooses to issue a communication directly and inevitably resulting in prejudice to an accused on trial, then the prosecutor must accept the consequence that the judicial department, charged with the duty of assuring the accused a fair trial before an impartial jury, will find it necessary to grant a new trial in the interests of justice according to the constitutional mandate. *Delaney v. United States,* supra, p. 114. See the concurring opinion of Mr. Justice Frankfurter in *Pennekamp v. Florida,* 328 U.S. 331, 354-66.

2. The publication of the "Philbrick Story" was not simply the publication of sensational headlines at the

commencement of the trial. Philbrick was described as one whose "electrifying testimony before Judge Howard Medina is generally conceded to have been instrumental in the conviction of the notorious 'Communist 11'." The so-called "Communist 11" were named in this indictment as alleged co-conspirators with petitioners. The publication announced that Philbrick's story would run in serial form and reveal "how the Communists intend to overthrow the U.S. government and when". Thus, from January 20, 1952 through February 7, 1952, both preceding and following the commencement of the trial, the community from which the jury was selected read the testimony of a witness as if he were at the trial, testifying to "when the Reds will strike", "exposure of the Communist Plot", "Ruthless Underground Red Tactics", etc., etc., without any opportunity on the part of petitioners to confront the witness or to object to patently inadmissible testimony. It was a deprivation of petitioners' rights to a fair and impartial trial to refuse to grant a continuance until 60 days after the conclusion of the serialized publications. Contrary to the view of the Court of Appeals a continuance was not requested "until Communism would have become a dead issue" (Appendix A, p. 39); it was only requested long enough for the prejudicial effect of the "Philbrick" stories to become dissipated. *Shepherd v. Florida, supra; Delaney v. United States, supra.*

This Court has stated: "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed

by law." *McNabb v. United States,* 318 U.S. 332, 347. These civilized standards of procedure appear not to have been met here and these serious questions in the administration of Federal criminal justice should be reviewed by this Court.

CONCLUSION.

The petitioners are not the first Americans to be prosecuted for their political opinions and associations. In the case of one alleged Communist, this Court, through a great chief justice, reversed the conviction, expressing the view:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political dissension, to the end that government may be responsive to the will of the people, and that changes, if desired, may be made by peaceful means."
>
> *De Jonge v. Oregon,* 299 U.S. 353, 365.

The petitioners here are all Californians. In the case of another Californian, again an alleged Communist, this Court, again through Chief Justice Hughes, directed a reversal, stating:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity

essential to the security of the Republic, is a fundamental principle of our constitutional system."

Stromberg v. California, 283 U.S. 359, 369.

The petition for writ of certiorari should be granted, the writ issued, and the judgments of conviction below reversed with instructions to the District Court to grant petitioners' motions for judgments of acquittal.

Respectfully submitted,

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